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IN THE

Supreme Court of the United States

October Term, 1968

OIL, CHEMICAL AND ATOMIC WORKERS
INTERNATIONAL UNION,
LONG BEACH LOCAL No. 1-128,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD
and
MACMILLAN RING-FREE OIL COMPANY, INC.,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the decision and decree rendered herein by the United States Court of Appeals for the Ninth Circuit on April 10, 1968, and May 1, 1968, respectively.

OPINIONS BELOW

The opinion of the court below is reported at 394 F.2d 26, and is reproduced in the separately bound Appendix to this Petition (hereinafter cited as "App.") at page 1. The

Decision and Order of the National Labor Relations Board, including the Trial Examiner's Decision which the Board adopted, is reported at 160 N.L.R.B. 877, and is reproduced at App. 18.

JURISDICTION

On April 10, 1968, the court below issued an opinion holding that the order issued in this case by the National Labor Relations Board should be enforced only in part, and that the remaining portions of the order should be set aside. On May 1, 1968, the court entered a decree in accordance with its opinion, enforcing only a part of the Board's order (App. 15). On June 24, 1968, Mr. Justice Douglas entered an order extending the time within which this Petition might be filed to and including July 30, 1968. This Court has jurisdiction to review the judgment of the court below by writ of certiorari under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Where the National Labor Relations Board has found, on substantial evidence, that an employer failed to bargain in good faith in the six-month period preceding the filing of an unfair labor practice charge, may a court of appeals set aside the Board's decision solely because the unlawful purpose and character of the employer's conduct within the six-month period was established primarily by examining it in the light of the history of the entire negotiations, which had commenced more than three years prior to the filing of the charge?

STATUTES INVOLVED

Section 8 of the National Labor Relations Act, 29 U.S.C. § 158, provides in pertinent part as follows:

> (a) It shall be an unfair labor practice for an employer –
>
> * * * * *

(5) to refuse to bargain collectively with the representatives of his employees. . .

* * * * *

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement. . .

Section 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b), provides in pertinent part as follows:

"Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect . . . Provided, that no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made . . . .

STATEMENT OF THE CASE

On November 10, 1964, after more than three years of fruitless collective bargaining, Petitioner (hereinafter referred to as the Union) filed an unfair labor practice charge against Respondent MacMillan Ring-Free Oil Company (hereinafter referred to as the Company), alleging a refusal to bargain in good faith. The National Labor Relations Board reviewed the entire record of the negotiations, and found that the Company had not bargained in good faith at any time, including during the six months prior to the filing of the charge. The court below set aside the Board's decision on the ground that the finding of bad faith was

supported primarily by evidence of events which had occurred outside the six-month limitation period prescribed by Section 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b).

This case thus squarely presents the question which this Court expressly left open in *Local 1424, Int'l Ass'n of Machinists v. N.L.R.B.*, 362 U.S. 411, 421-22 (1960)-whether a finding that a unfair labor practice has been committed within the limitations period can be sustained where "the merit of the allegations in the complaint is shown largely by reliance on earlier events."

In order to understand the decision of the court of appeals, it is necessary to review the findings of fact on which the Board based its conclusion that the Company had failed to bargain in good faith. We turn, therefore, to a summary of those findings.[1]

The Facts As Found By The Board

At the time this case arose, the Union was the collective bargaining representative of the production, maintenance, and plant clerical employees at the Company's oil refinery at Signal Hill, California.[2] The parties' first collective

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[1] Although there were many factual issues in dispute before the Board and in the court below, the court did not disturb any of the Board's fact findings, and the Union does not challenge any of them here. It should also be noted that there are a number of factual issues discussed in the Board's decision which relate to violations other than the alleged refusal to bargain in good faith, or which relate to defenses raised by the Company other than the defense based on Section 10(b) of the Act. Since this Petition is directed solely to the court's refusal, on the basis of Section 10(b), to affirm the Board's finding of a failure to bargain in good faith, we will summarize only those findings of fact which are relevant to that issue.

[2] The Board actually found that the Union's parent organization, Oil, Chemical and Atomic Workers International Union, was the bargaining agent (App. 27), but for present purposes the Local and its parent International can be treated as one.

bargaining agreement was executed on November 18, 1960 (App. 24), and was terminated by mutual agreement on June 13, 1961. The parties agreed at that time to "meet as quickly as possible for the purpose of negotiating a new agreement." (App. 29)

At the outset of the negotiations, the Union proposed that the parties readopt their prior agreement, with a single amendment to provide four rather than three weeks of vacation to employees with twenty or more years of service (App. 30). The Company rejected this proposal, and on July 27, 1961, tendered its own draft of a proposed agreement (App. 30-31).

The Company's proposal contained a number of drastic departures from the terms of the parties' prior agreement, all of them detrimental to the Union and the employees. For example, the Company's proposal would have eliminated the checkoff of Union dues, replaced the former "union shop" provision with a "maintenance of membership" clause, deleted a provision for compensating employees for time spent in processing grievances or participating in collective bargaining negotiations, and imposed greater restrictions on leaves of absence for Union business. It would also have authorized the Company to discharge or discipline employees for any of thirty-five specified "rule infractions" without recourse by the Union or the employees to the grievance procedure or arbitration. In addition, the proposal would have sharply reduced the circumstances in which the Company would have to pay premium wage rates for shift work or work on a regularly scheduled day off, and would have increased management's unilateral authority to subcontract work or to layoff, promote or recall employees without regard to their seniority. Finally, the Company proposed substantial changes in the no-strike clause, including the deletion of language which allowed employees to refuse to work under unsafe conditions (App. 30-33).

Not surprisingly, the Union was unwilling to agree to these terms, but the Company refused to recede from

them and the negotiations dragged on for more than a year without any discernible progress.

There was no change in the Company's position until October 18, 1962, when it submitted a second proposal which was even less acceptable to the Union than its earlier one. This draft omitted even the "maintenance of membership" provision of the prior proposal, and provided instead for an "open shop." It also omitted the provision which had been contained in both the prior agreement and in the Company's prior proposal, providing that discharge or disciplinary action "shall be only for just cause." Finally, it contained a new provision, not found either in the prior agreement or in the Company's prior proposal, which stated that "where arbitration is sought and the Company claims the matter is not subject to the arbitration provisions of this Agreement, then the matter of arbitrability shall first be decided by a court of law." In all other respects, the Company's proposal of October 18, 1962, was substantially identical to its prior proposal (App. 36).

At some point in 1962 – the precise date does not appear in the record – the parties agreed to defer any discussion of wages until the negotiations in the oil industry, which were then in progress, had reached the point of establishing an industry wage pattern. By January, 1963, such a pattern apparently had emerged, and the parties then agreed to a 5% wage increase (App. 38). The parties remained deadlocked, however, on the other issues in dispute. Five further meetings in 1963 produced no progress toward settlement (App. 39).

At a meeting on December 13, 1963, the Union asked the Company whether it would submit "a final proposal." The Company replied that it was not ready to do so at that time, but that it would prepare such a proposal and contact the Union "right after Christmas" to schedule a meeting (App. 39).

The Company did not contact the Union as it had promised. Instead, on February 27, 1964, the Company distributed to all the employees a letter, nominally

addressed to the Union, stating that as part of its "policy" to "improve its employee program," it had decided to grant a four-week vacation to all employees with 20 years or more of service (App. 40). This action was taken entirely unilaterally, without any prior notice to or discussion with the Union. The letter did not mention the fact that the Union had proposed this identical vacation improvement at the beginning of the negotiations. It simply stated:

> "Unless we hear from you to the contrary, we shall assume this change in employees' benefits meets with your approval. However, should you not wish for MacMillan to grant this new benefit, please advise us and we will be happy to discuss the matter with you." (Gen. Counsel Ex. 3(1).)

Since the Union itself had originally proposed this benefit, the employees readily accepted it, and, at the Union's request, it was reduced to writing in a signed letter of agreement on March 3, 1964 (App. 41).

By March 18, 1964, the Union had still heard nothing from the Company concerning its "final proposal" or the resumption of bargaining. It therefore submitted to the Company on that date a new written proposal of its own. In response, the Company, in a letter dated March 30, stated that it needed time to study the Union's new proposal and would communicate further with the Union when it had done so. By late April, 1964, the Union had heard nothing further, and it therefore called the Company to request a meeting. As a result, the parties held their first bargaining meeting in more than five months on May 7, 1964 (App. 41).

This meeting was devoted primarily to a discussion of the Union's proposal. At the end of the meeting, the parties agreed to defer further discussions until after a settlement in the new round of industry-wide negotiations, which were then either in progress or imminent (App. 42).

By September, 1964, a pattern had emerged from these renewed industry negotiations, and, at the Union's request, a bargaining session was scheduled for September 2, 1964 (App. 45). Just prior to the meeting, the Union negotiating committee decided that in light of the fact that the Company had still not submitted the contract proposal it had promised to send "right after Christmas," the negotiations ought to be brought "to a head." Accordingly, the committee decided to call a strike on September 8, if no adequate progress was made in the negotiations by that date (App. 46).

At the meeting of September 2, 1964, the Union asked the Company for the "final proposal" which had been promised at the meeting of December 13, 1963. The Company responded by giving the Union a draft of a contract which was in all material respects identical to the Company's prior proposal of October 18, 1962. After examining the draft, the Union informed the Company that it was no more acceptable than its prior proposal, and that unless an agreement was reached by September 8, the Union would strike (App. 46-47).

The parties met again on September 4, 1964, with a federal mediator, but no progress toward agreement was made (App. 51). There were no further meetings prior to the strike, which commenced as scheduled on September 8. The strike was still in progress at the time of the hearing in this case in November, 1965.

The parties continued to meet during the strike, but the Company adamantly adhered to its position. Indeed, at a meeting on December 4, 1964, the gulf between the parties was widened even further as a result of a new Company proposal which would have required the Union, in any future strike, to pay the strikers the full wages they would otherwise have earned.[3] The Union rejected this proposal

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[3] This proposal read as follows: "The Union agrees that any time a strike, work stoppage, or interruption of work or other concerted activity occurs by the employees covered hereunder during the term

(footnote continued on page 9)

with the comment that it knew of no union in the United States that could possibly agree to such a provision.

The Union indicated a willingness to meet again promptly, but the Company said that it would be unavailable until after the Christmas-New Year holidays (App. 55).

The parties met on six different occasions between January 12, 1965 and April 2, 1965, but no substantial progress was made in these meetings, nor was there any change in the Company's position on any of the issues in dispute (App. 55-57). No further meetings were held after April 2, 1965.

The Board's Conclusions

The Board recognized that the ultimate question to be decided was whether the Company failed to bargain in good faith in the six-month period preceding the filing of the charge. It held, however, citing this Court's decision in *Local 1424, Int'l Ass'n of Machinists v. NLRB*, 362 U.S. 411, 416 (1960), that the parties' prior discussions and contract proposals could be considered "to shed light on the true character of matters occurring with the limitation period." (App. 30.) Accordingly, it based its decision on an examination and analysis of the Company's conduct and attitude throughout the entire period of the negotiations.

After reviewing in detail the Company's contract proposals, and the explanations offered by the Company for its adamant insistence upon so many drastic revisions of the parties' prior agreement, the Board concluded that the Company's real negotiating aim

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(continued from page 8)

of this agreement or within one (1) year from its termination, the Union shall pay each striking employee eight (8) hours per day and forty (40) hours per week at his then hourly wage rate for all the time he is on strike, including time and one-half (1½) for all hours spent picketing in excess of eight (8) hours per day and forty (40) hours per week with double (2) time for Sunday and holiday picketing." (App. 54-55)

"... was to prevent the conclusion of a 'new labor agreement,' and the purpose appears clearly in the Company's negotiating tactics directed to matters of vital importance to the International's representative status and capacity. The basic method used was not to retain as much as possible of the 1960 contract, as Becker claims in his testimony, but to take away much, by omission or substitution, related to that capacity (not to speak of the scaling down of employees' benefits); to inject proposals into the negotiations carrying an aura of inhibition upon the International and the employees it represents, and then increase the climate of inhibition and disparagement of the bargaining representative, as the meetings and years wore on, with the injection of additional restrictive proposals that, especially in the light of prior discussions, were predictably unacceptable to the Union, and foreseeably productive of deadlock." (App. 81-82.)

The Board found further evidence of the Company's bad faith in the fact that it repeatedly delayed the negotiations by the use of dilatory tactics. In addition, the Board found it significant that when the Company finally decided to grant the vacation improvement which the Union had requested, it did so in a manner which would "reasonably lead employees represented by the International, even if they had prior knowledge of its vacation proposal, to believe that the benefit was an act of grace by the Company 'for all MacMillan employees' in pursuit of its 'policy,' rather than the product of the International's representation." (App. 68).

The Board summarized its conclusions on the issue of the Company's refusal to bargain in good faith as follows:

"Summarizing the matter, the Respondent's bad faith in the negotiations is abundantly established by the evidence of a purpose to

prevent agreement through its progressive injection into the negotiations, as time went on, of mounting proposals for inhibition of the International's representative capability and status; the method used in 1964 to announce and put into effect the vacation benefit proposed by the Union almost 3 years earlier; and the Company's foot-dragging in arranging a meeting and submitting a 'final proposal' following the session of December 13, 1963, as evidenced by the broken promises to arrange one made at that session, and in the Company's letter of March 30, 1964, by the fact that no meeting was held between December 13, 1963, and May 7, 1964, and then only upon the Union's initiative, and by the Company's failure to submit a 'final proposal' until September 2, 1964 (which, apart from the oral 4½-percent offer that followed the industry's bargaining pattern in amount, was substantially the same, for all practical purposes, as its contract proposal in 1962.)" (App. 89-90).

On the issue of whether the Company's unfair labor practices had occurred within the six month period prior to the filing of the charge, the Board found it to be "abundantly clear"

". . . that the Respondent's negotiating attitude and goals regarding 'a new labor agreement' have not been materially different within the 6-month period preceding the filing and service of the charge, and since then, including the period since the current strike began, from what they were prior to May 10, 1964, evidencing the same design to frustrate the bargaining process and prevent the conclusion of such an agreement, and by the same methods, exemplified by continued insistence, within the 6-month period, and since, upon propositions born of that design and variously embodied in the Company's con-

tract proposals of July 27, 1961, October 18, 1962, and September 2, 1964; and by the proposal of December 4, 1964." (App. 90-91).

The Board further found that "the origin of the strike, and its prolongation, are rooted in Respondent's conduct aimed at preventing 'a new labor agreement' to replace the 1960 contract" (App. 90).

Accordingly, it held that the strikers were entitled to reinstatement upon their unconditional request and that the Company was obligated to discharge any strike replacements it may have hired if such action was necessary to provide reinstatement to the strikers (App. 98, 101).

The Decision Of The Court Of Appeals

The Court below acknowledged that "the long history of the parties' negotiations, heavily relied upon by the Board, casts a certain amount of doubt on the good faith of the company" (App. 7). By way of illustration, the court cited, as indicia of the Company's bad faith, the fact that it had "moved with a pronounced lack of promptness in certain portions of the negotiations," the fact that it had unilaterally announced the improved vacation benefit "in a manner and using language calculated to raise doubts in the minds of the employees as to whether the union was effectively representing them," and the fact that the Company was "to some extent contradictory and evasive when responding to questions concerning the reasons for some of [its] more severe proposals" (App. 7-8).

The court emphasized, however, that the ultimate question presented was whether the Company had failed to bargain in good faith after May 10, 1964, which was the beginning of the 6-month period of limitations. It noted that because the parties had suspended their negotiations from May 7, 1964 to September 2, 1964, to await the outcome of the industry negotiations, the only significant event which had occurred between May 10, 1964 and the

commencement of the strike was the negotiating session of September 2, 1964 (App. 4). Although at that meeting the Company had resubmitted as its "final proposal" the same proposed contract which the Board found was deliberately designed to frustrate the negotiations, the court said that the Company's conduct on September 2, "standing alone . . . is plainly insufficient to support the Board's conclusion that the company violated section 8(a)(5)" (App. 4).

The Court also referred to the proposal tendered by the Company on December 4, 1964, while the strike was in progress, which would have required the Union to pay strikers their full wages in any future strike. The Court recognized that "the extreme or bizarre character of a party's proposals" may be evidence of a lack of good faith, but held that this single proposal, since it was only mentioned on one occasion, could not in itself support the Board's decision (App. 5-7).

The court therefore concluded that the events subsequent to May 10, 1964, when viewed in isolation, were insufficient to support the Board's unfair labor practice finding. It thus became necessary for the court to determine whether the inference drawn from events which occurred prior to May 10, 1964, could properly be relied upon to support the Board's finding that the Company had failed to bargain in good faith after that date.

In search of guidance on this issue, the court examined in detail the decision of this Court in *Local 1424, Int'l Ass'n of Machinists v. NLRB*, 362 U.S. 411 (1960). The court acknowledged that the *Machinists* case was "not directly in point," and had in fact "expressly refrained from passing judgment" on the question presented here. Nevertheless, the court, while admitting that "the question is not without difficulty," concluded that "the thrust of the Court's reasoning" in that case required reversal of the Board's decision in the present case (App. 11-12).

The Court conceded that evidence antedating the limitations period can be relied upon to "shed light" on more recent events, but held that "the evidence of a

violation drawn from within that period must be reasonably substantial in its own right" (App. 13-14).

REASONS FOR GRANTING THE WRIT

Introduction

Twenty years ago, this Court reaffirmed "the established judicial rule of evidence that testimony of prior or subsequent transactions, which for some reason are barred from forming the basis for a suit, may nevertheless be introduced if it tends reasonably to show the purpose and character of the transactions under scrutiny." *FTC v. Cement Institute*, 333 U.S. 683 (1948). Both the National Labor Relations Board and the courts of appeals have long struggled with the question of whether, and to what extent, this principle permits reliance on events which occurred outside the six-month limitations period prescribed by the National Labor Relations Act to determine whether an unfair labor practice has been committed within that period.

One aspect of that problem was before this Court in *Local 1424, Int'l Ass'n of Machinists v. NLRB*, 362 U.S. 411 (1960). In that case, a union and an employer had entered into a collective bargaining agreement at a time when the union represented less than a majority of the employees involved. More than six months after the execution of the contract, a charge was filed alleging that the union's original lack of a majority rendered the contract itself unlawful, and that the continued enforcement of the contract was therefore an unfair labor practice. Aside from the circumstances of its original execution, the contract was entirely valid and lawful. Nevertheless, the Board had held that the mere existence of the contract was a "continuing violation," and that the charge was therefore timely even though it was filed more than six months after the date on which the contract was first executed. This Court reversed, holding that the

six-month limitations period had begun to run upon the execution of the contract, since the union's lack of majority status at that time was the real basis for the charge.

In reaching this result, the Court distinguished between two different kinds of situations:

> "The first is one where occurrences within the six-month limitations period in and of themselves may constitute, as a substantive matter, unfair labor practices. There, earlier events may be utilized to shed light on the true character of matters occurring within the limitations period; and for that purpose § 10(b) does not bar such evidentiary use of anterior events. The second situation is that where conduct occurring within the limitations period can be charged to be an unfair labor practice only through reliance on an earlier unfair labor practice. There the use of the earlier unfair labor practice is not merely 'evidentiary,' since it does not simply lay bare a putative current unfair labor practice. Rather, it serves to cloak with illegality that which was otherwise lawful. And where a complaint based upon that earlier event is time-barred, to permit the event itself to be so used in effect results in reviving a legally defunct unfair labor practice." (*Id.* at 416-17)

The Court concluded that the case before it fell into the second of these two categories, "for the entire foundation of the unfair labor practice charge was the Union's time-barred lack of majority status when the original collective bargaining agreement was signed." *Id.* at 417.

The present case, on the other hand, falls into the first category. Here the charge alleged, and the Board found, that the Company had failed to bargain in good faith within the six-month limitations period. Such conduct, in and of itself, constitutes an unfair labor practice, without

regard to any prior act or event. However, in order to determine the "true character" of the Company's conduct within the limitations period — *i.e.*, whether it was acting in good faith or in bad faith, whether it was bargaining with a sincere desire to reach an agreement or with the object of avoiding agreement — the Board reviewed the whole history of the parties' relationship, and particularly the history of the negotiations. On the basis of its review of the Company's entire course of conduct, the Board concluded that the Company had failed to bargain in good faith throughout the negotiations, both before and during the six-month period preceding the filing of the charge, and thereafter.

The Court below did not dispute the contention that the record in this case, viewed as a whole, "would provide a sufficient foundation for the Board's finding of a refusal to bargain" (App. 9). It also acknowledged that "the violation found by the Board 'occurred' within the specified six-month period before the filing of the charge." (App. 9). Nevertheless, it held that the Board's finding could not stand, because it was based primarily on inferences drawn from evidence of events which had occurred prior to the limitations period.

The question thus presented was adverted to by this Court in the *Machinists* case, but the Court expressly refrained from deciding it at that time:

> "Indeed, some Board cases have . . . held § 10(b) a bar in circumstances when, although none of the material elements of the charge in a complaint need necessarily be proved through reference to the barred period — so that utilization of evidence from that period is ostensibly only for the purpose of giving color to what is involved in the complaint — yet the evidence in fact marshalled from within the six-month period is not substantial, and the merit of the allegations in the complaint is shown largely by reliance on earlier events. News Printing Co., 116

N.L.R.B. 210, 212; Universal Oil Products Co., 108 N.L.R.B. 68; Tennessee Knitting Mills, Inc., 88 N.L.R.B. 1103. However, we express no view on the problem raised by such cases, for here we need not go beyond saying that a finding of violation which is inescapably grounded on events predating the limitations period is directly at odds with the purposes of the § 10(b) proviso." 362 U.S. at 421-22.

The question which this Court thus left open in *Machinists* is now squarely presented by this case. As we shall demonstrate below, it has repeatedly arisen in a variety of contexts, and has led to conflicting and inconsistent decisions by both the courts of appeals and the Board. Since this is an issue of fundamental importance in the administration of the Act, it should now be settled by this Court.

I

The decision of the Court below is in direct conflict with decisions of other courts of appeals. For example, in *Sheet Metal Workers' Int'l Ass'n v. NLRB*, 293 F.2d 141 (D.C. Cir. 1961), *cert. denied*, 368 U.S. 896 (1961), the court was confronted with a Board finding that a union had violated Sections 8(b)(4)(B) and (C) of the Act, 29 U.S.C. §§ 158(b)(4)(B), (C), by inducing employees of certain other employers to refuse to handle or install products manufactured by Burt Manufacturing Company. Under the statutory provisions involved, such conduct would constitute a violation only if "an object thereof" was to force Burt "to recognize or bargain with" the union. Although the allegedly unlawful conduct occurred within the limitations period, "the Board's finding that an object of petitioners' conduct was to compel Burt to recognize Local 70 was based *exclusively* on evidence of events antedating December 5, 1956," the date on which the six-month period commenced. *Id.* at 146 (emphasis added).

The union in that case, like the Company here, argued that the Board may not rely wholly on events which occurred outside the six-month period even to prove the unlawfulness of conduct occurring within that period. The District of Columbia Circuit, however, unlike the Ninth Circuit in this case, held to the contrary. After reviewing and quoting at length the opinion of this Court in the *Machinists* case, the court concluded:

> "In this case the Board has relied upon events occurring prior to the limitation period to 'shed light on the true character' of the objective of petitioners' conduct within that period. Thus, such events are 'merely evidentiary.' As such, they are admissible in support of charges under 8(b)(4)(B) and (C) and their probative weight is for the Board's determination .... It follows that the Board's finding that an object of the Local's conduct was to obtain recognition is supported by substantial evidence." *Id.* at 147.

The issue in that case is strikingly similar to the question presented here. In both cases, the legality of conduct occurring within the six-month period depended entirely on its "object" or purpose. In the *Sheet Metal Workers* case, the question was whether the "object" of certain actions taken by the union within the six-month period was to force Burt Manufacturing Company to recognize and bargain with it. In the present case, the issue was whether the "object" of the Company's bargaining activities within the six-month period was to frustrate the negotiations and prevent the consummation of an agreement. In both cases, the Board found the unlawful object on the basis of evidence which antedated the limitations period. The District of Columbia Circuit held that it was proper for the Board to rely on such evidence, the Ninth Circuit held that it was not. Both courts relied on their respective interpretations of the opinion of this Court in the *Machinists* case. The conflict could not be more clear.

Another more recent decision of the District of Columbia Circuit is also inconsistent with the result reached in the present case. In *International Union, United Automobile Workers v. NLRB*, 363 F.2d 702 (D.C. Cir. 1966), *cert. denied*, 385 U.S. 973 (1966), an employer, after refusing a union's demand for recognition and bargaining, proceeded to engage in a variety of unlawful activities in an effort to dissipate and undermine the union's support among the employees. The Board found that the union represented a majority of the employees at the time of its original demand for recognition and at all relevant times thereafter, and therefore held that the employer had unlawfully refused to bargain. However, the union's demand for recognition, and the company's express refusal to bargain, had both occurred more than six months prior to the filing of the charge, and were not repeated thereafter. The company therefore argued that the charge, insofar as it alleged an unlawful refusal to bargain, was barred by Section 10(b). The court disagreed and upheld the Board's finding that the company's subsequent conduct constituted a "continuing refusal" to bargain with the union:

> "The Company contends that the continuing offense theory is impermissible in light of Local Lodge No. 1424 International Assoc. of Machinists v. NLRB, 362 U.S. 411, 80 S. Ct. 822, 4 L.Ed.2d 832 (1960). That decision cannot be viewed so broadly. When within the six-month period there has been active conduct, as contrasted with mere passive inaction following an old offense, it is open to the Board to refer to previous acts "to shed light on the true character of matters occurring within the limitations period." 362 U.S. at 416, S.Ct. at 826. In effect what was involved here was a basic Company approach started more than six months prior to the charge, but carried forward by more

> recent actions. The Board in effect viewed the actions within the six-month period as reiterations by deed of the underlying refusal to bargain and hence as establishing a violation of Section 8(a)(5). We think this was within its authority under the Act." *Id.* at 706-707.

This reasoning is plainly at odds with the approach taken by the court below. In the present case, the court held that it was impermissible for the Board to treat conduct occurring within the six-month period as a continuation of "a basic Company approach started more than six months prior to the charge," in the absence of some substantial evidence, drawn from the six-month period itself, that the company was guilty of the unfair labor practice with which it was charged. In the *Auto Workers* case, the actions taken by the company within the six months, although unlawful for other reasons, could not in themselves provide the basis for a finding of an unlawful refusal to bargain. Only when viewed in the light of earlier events was such a finding possible. Nevertheless, the Board made such a finding, and the Court of Appeals in that case sustained it.

Also in conflict with the decision below are the decisions of three other circuits on the question of whether the Board may find an unlawful refusal to reinstate "unfair labor practice" strikers in a situation in which the underlying unfair labor practice which caused the strike occurred more than six months prior to the filing of the charge. The Board has long held that when a strike is caused or prolonged by an employer's unfair labor practice, it is a violation of Section 8(a)(3) of the Act for the employer to refuse to reinstate the strikers upon their unconditional request, even if permanent replacements have been hired in the interim. The Board has also held, however, in a case which arose shortly after the enactment of the limitations proviso of Section 10(b), *Greenville Cotton Oil Co.*, 92 N.L.R.B. 1033 (1950), *affirmed sub.*

nom., American Fed. of Grain Millers v. NLRB, 197 F.2d 451 (5th Cir. 1952), that a charge alleging an unlawful refusal to reinstate unfair labor practice strikers is untimely if filed more than six months after the occurrence of the original unfair labor practice which provoked the strike. Three courts of appeals have disagreed with this view, and have held instead that a charge is timely if filed within six months of the denial of reinstatement.

The first of these decisions was *NLRB v. Brown & Root, Inc.,* 203 F.2d 139, 145-46 (8th Cir. 1953), in which the court expressly disapproved the Board's decision in *Greenville Cotton.* The Board itself had distinguished *Greenville Cotton* on the ground that, in *Brown & Root,* the unfair labor practice which had provoked the strike had been the subject of a separate charge, which had been timely filed and which had been adjudicated in a separate proceeding. The Eighth Circuit, however, expressly disclaimed reliance on this distinction, and instead enforced the Board's decision on the ground that *Greenville Cotton* itself was an "illogical" decision. *Id.* at 145-46.

The Sixth Circuit reached the same result in *Philip Carey Co. v. NLRB,* 331 F.2d 720 (6th Cir. 1964), *cert. denied,* 379 U.S. 888 (1964). The court in that case, after noting the conflict between the Board's decision in *Greenville Cotton* and the Eighth Circuit's decision in *Brown & Root,* held that "the more logical approach" was that reflected in the latter case. *Id.* at 732.

Finally, the Fifth Circuit, which had originally affirmed *Greenville Cotton,* appears to have reversed its position in *NLRB v. American Aggregate Co.,* 305 F.2d 559, 563 (5th Cir. 1962):

> "In a § 8(a)(3) striker reinstatement case the significant thing is not when the strike started, or how long it has gone on. What is important is the status of the returning striker. This is because an employer's responsibility of reinstatement is quite differ-

> ent for those who struck to gain economic bargaining power than it is for those who struck as a protest against an employer's unfair labor practices. Determination of the employees' status must therefore necessarily depend on the causes of the strike. It is inescapable that such evidence will have to go back to the beginning, or at least to the time the character of the strike changed. But § 10(b) does not bar evidence. It bars charges. The charge under review was not the Company's actions giving the strike its unfair labor practice character. It was that, within the 6 months' period, the Company refused to reinstate an employee then having a significant status entitling him to different treatment."

Plainly, the decisions in *Brown & Root, Philip Carey,* and *American Aggregate* are all inconsistent with the decision of the court below in the present case. Indeed, one of the Board's findings in this case was that the strikers here were unfair labor practice strikers entitled to reinstatement upon their unconditional request. The court reversed that finding on the ground that the underlying unfair labor practice itself, although it admittedly occurred within the six-month period, could be established only by reliance upon evidence which antedated that period. In the three cases cited above, on the other hand, the courts held that even if the underlying unfair labor practice itself *occurred* outside the limitations period, the Board could still find that certain strikers were unfair labor practice strikers, and order their reinstatement.[4]

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[4] It should be noted that this Court, in *Machinists,* cited *Greenville Cotton* as one example of a Board decision holding that a charge is barred by Section 10(b) "where the gravamen of the unfair labor practice complained of lay in a fact or event occurring during the barred period." 362 U.S. at 420. It is therefore possible to argue

(footnote continued on page 23)

II

The Board's own decisions have not been consistent on the question presented in this case, and have thus contributed to the present confused state of the law.

In *Machinists* this Court cited three Board decisions as holding that a charge is barred by Section 10(b), even if it alleges a violation occurring within the limitations period, "if the evidence in fact marshalled from within the six-month period is not substantial, and the merit of the allegations . . . is shown largely by reliance on earlier events." This rule, with respect to which this Court expressed "no view," is the one which the Court below applied in the present case.

The three cases referred to were *News Printing Co.*, 116 N.L.R.B. 210 (1956); *Universal Oil Products Co.*, 108 N.L.R.B. 68 (1954); *Tennessee Knitting Mills, Inc.*, 88 N.L.R.B. 1103 (1950). Two of these cases presented a quite different problem than that involved here. Both *Universal Oil Products* and *Tennessee Knitting Mills* involved charges which alleged that the employers had unlawfully assisted or dominated a labor organization in violation of Section 8(a)(2) of the Act, 29 U.S.C. § 158(a)(2). In both cases, the evidence showed considerable unlawful conduct prior to the six-month period preceding the filing of the charge, but no significant *acts* of assistance or domination with that period. The Board concluded in

(continued from page 22)

that this Court has impliedly approved *Greenville Cotton*, and that the court of appeals decisions to the contrary are therefore in conflict with the decision of this Court. On the other hand, since both *American Aggregate* and *Philip Carey* were decided subsequent to *Machinists*, it is apparent that at least two courts of appeals are not persuaded that this Court has settled the issue. Thus, whatever the merits of those decisions, they at least demonstrate that there is considerable conflict and confusion among the circuits as to the extent to which the Board may rely upon events which occurred more than six months prior to the filing of an unfair labor practice charge in order to determine whether a violation has occurred within that six-month period.

each case that such allegedly unlawful acts as had occurred in the six-month period were too "insubstantial" to constitute an unfair labor practice, and that Section 10(b) precluded a finding of a violation based entirely on the earlier events. These cases merely stand for the proposition that there can be no unfair labor practice finding in the absence of some act (or failure to act) within the six-month period which constitutes a violation of the statute. They do not involve the question presented in this case, which is whether the Board may look to earlier events to determine whether an act (or failure to act) which *has* occurred within the six-month period was or was not unlawful.

Of the three cases referred to above, only *News Printing Co.*, 116 N.L.R.B. 210 (1956), dealt with this issue. There the allegation was that the employer had discriminatorily denied wage increases to certain employees because of their union activities. The evidence drawn from the six-month period showed only that certain employees had in fact been denied wage increases, but not the reason or motive for that denial. However, a prior Board decision in an earlier case had found the same employer guilty of discriminating against the same employees, and others, because of their union activities, and such prior discriminatory conduct had included refusals to grant wage increases to union supporters. On the basis of these prior findings, the Trial Examiner concluded that the employer had simply repeated the same pattern of unlawful conduct. The Board held, however, that while the earlier decision "was admissible as background evidence, it was improper for the Trial Examiner to give it independent and controlling weight in determining whether the Respondent had discriminatorily denied wage increases to the Charging Parties in violation of the Act." *Id.* at 212.

On the other hand, the Board, in subsequent cases, has reached the opposite result on almost identical facts. For example, in *Paramount Cap Mfg. Co.*, 119 N.L.R.B. 785 (1957), *enforced*, 260 F.2d 109 (8th Cir. 1959), the

employer was found guilty of discriminatorily denying re-employment to two laid-off employees, although the only evidence of a discriminatory motive was contained in the record of a prior Board proceeding which showed that more than six months prior to the filing of the charge the employer had expressed hostility toward the Union, and had threatened reprisals for union activity. The only difference between *Paramount* and *News Printing* was that in the former case the employer had offered an innocent explanation for his actions, which the Trial Examiner had discredited, while in the latter case the employer had offered no evidence at all. The Board attempted to use this difference as a basis for distinguishing the cases, but it is clear that in both cases the only affirmative evidence of the discriminatory motive, which was an essential element of the violation, consisted of actions or statements of the employer which had occurred prior to the Section 10(b) period. Yet in one case the Board found a violation, and in the other it refused to do so. In two subsequent cases involving essentially similar facts, the Board followed *Paramount* rather than *News Printing*. *Dan River Mills, Inc.*, 125 N.L.R.B. 1006 (1959); *Newton Falls Paper Mill, Inc.*, 144 N.L.R.B. 1470 (1963). See also *Banner Die Fixture Co.*, 109 N.L.R.B. 1401 (1954), 115 N.L.R.B. 1692 (1956), *enforced*, 42 L.R.R.M. 2604 (6th Cir. 1958).

In other types of cases the Board has similarly found unfair labor practices to have occurred within the limitations period, although essential elements of the violations involved could be proved only by using evidence which antedated that period. Thus, for example, the Board has held picketing to be unlawful because its "object" was to obtain recognition, although the unlawful object was proved entirely by evidence of events occurring more than six months prior to the filing of the charge. *E.g.*, *General Teamsters Union Local 912*, 120 N.L.R.B. 1577 (1958); *Paint, Varnish & Lacquer Makers Union*, 120 N.L.R.B. 1425 (1958). The Board has also held unlawful a job referral system which gave preferential rights to employees with longer service, because it was shown that the

parties in the past – prior to the Section 10(b) period – had discriminatorily given preferential employment rights to union members. Thus, what appeared on its face to be a non-discriminatory seniority system was shown, by evidence of events which had occurred outside the limitations period, to constitute a method of perpetuating a discriminatory system. *Local 269, Int'l B'hd of Elec. Workers,* 149 N.L.R.B. 768 (1964), *enforced,* 357 F.2d 51 (3d Cir. 1966). On the other hand, in *Bowen Products Corp.,* 113 N.L.R.B. 731 (1955), the Board reached the opposite result in an analogous situation.

In short, the decisions of the Board are as confused and inconsistent as the decisions of the courts of appeals. It is thus apparent that this important area of the law can be clarified only by this Court.

III

The importance of the question presented in this case is demonstrated by the frequency with which it has arisen in litigation under the National Labor Relations Act. As the cases canvassed above make clear, there are many unfair labor practices which are difficult or impossible to prove without reliance on evidence of events which have occurred prior to the six-month limitations period. There are at least two reasons why this is so. First, there are many unfair labor practices which require a showing of motive, intent, object, or purpose. These elements cannot usually be proved by direct evidence; they must be inferred from a pattern or course of conduct, which frequently extends over a long period of time. Second, the problem is exacerbated by the fact that the limitations period prescribed by the National Labor Relations Act is only six months, which is much shorter than that prescribed by most statutes of limitations. The issue involved in the present case, therefore, is much more likely to arise under the National Labor Relations Act than under most other statutes.

It follows that the enforcement of the substantive provisions of the Act will likely be seriously hampered until the issue presented here is finally resolved. The present confused state of the law tends to encourage litigation even in cases where the substantive violation is clear, simply because of the possibility that the Board or a court may ultimately find that the case is time-barred. Moreover, the General Counsel of the Board himself is not now in a position to determine with certainty whether a charge is or is not timely under Section 10(b). In some cases, therefore, he may erroneously refuse to issue a complaint when one is warranted, thus finally foreclosing the enforcement of the Act in the particular case. An example of a situation in which this almost occurred is *Swift Service Stores, Inc.*, 169 N.L.R.B. No. 33, 67 L.R.R.M. 1181 (Jan. 26, 1968), where the charge was originally dismissed by the General Counsel on the ground that it was time-barred. Thereafter, the charging party took the unusual step of requesting the General Counsel to reconsider his action, whereupon the General Counsel reversed his earlier decision, and issued a complaint. *Id.* at 1183-1184. The Board ultimately found a violation, but in doing so it had to struggle not only with the Section 10(b) issue, but also with the question of the General Counsel's power to reverse himself after originally dismissing a charge.

The limitations proviso of Section 10(b) has been a part of the statute since 1947. Although it has been the subject of much litigation, the cases have served more to confuse than to clarify the issue of whether, and to what extent, the Board may rely on evidence dating from before the limitations period to determine whether a violation has occurred within that period. This Court decided one aspect of that problem in the *Machinists* case; the present case presents the other aspect of the problem, which was expressly left open in Machinists. This issue, as we have seen, has arisen frequently, and has been the subject of inconsistent and conflicting decisions by both the Board

and the courts. It is a question of fundamental importance in the administration of the National Labor Relations Act. It should now be decided by this Court.

CONCLUSION

For the reasons stated above, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1968

OIL, CHEMICAL AND ATOMIC WORKERS
INTERNATIONAL UNION,
LONG BEACH LOCAL No. 1-128,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD
and
MACMILLAN RING-FREE OIL COMPANY, INC.,

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

National Labor Relations Board,
Petitioner,
vs. : No. 21,902
MacMillan Ring-Free Oil Co., Inc.,
Respondent.

[April 10, 1968]

On Petition for Enforcement of an Order of
The National Labor Relations Board

Before: BARNES, HAMLEY and KOELSCH, Circuit Judges

BARNES, Circuit Judge:

The National Labor Relations Board herein petitions under section 10(e) of the National Labor Relations Act, 29 U.S.C. §160(e) (1964), for enforcement of an order issued by the Board on September 2, 1966, against the MacMillan Ring-Free Oil Company, Inc.

The Board's decision and order, reported at 160 N.L.R.B. No. 70, include findings that (1) the company had violated subsections 8(a)(1) and (3) of the Act, 29 U.S.C. §158(a)(1), (3) (1964),[1] by withholding the vacation

[1] "§158. Unfair labor practices.

"(a)It shall be an unfair labor practice for an employer–

"(1)to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title [section 7 of the Act];

". . .

(Continued)

pay of four employees because they were on strike, thereby discriminating against them for engaging in union activity; (2) the company also had violated subsections 8(a)(1) and (5) of the Act, 29 U.S.C. §158 (a)(1), (5) (1964),[2] by failing to negotiate in good faith with the certified bargaining representative of its production and maintenance employees, the Oil, Chemical and Atomic Workers International Union, AFL-CIO;[3] and (3) a strike beginning on September 8, 1964, had been caused and prolonged by the company's improper refusal to bargain. Accordingly, the Board ordered the company to cease and desist from the unfair labor practices found and from interfering in any

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(Footnote continued from preceding page)

"(3)by discrimination in regard to hire or tenure of employment or any terms or condition of employment to encourage or discourage membership in any labor organization . . . ."

Section 7 of the Act, 29 U.S.C. §157 (1964), provides as follows:

"§157. Right of employees as to organization, collective bargaining, etc.

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ."

[2] "(a) It shall be an unfair labor practice for an employer —

". . .

"(5)to refuse to bargain collectively with the representatives of his employees . . . ."

It is undisputed that the existence of a section 8(a)(1) violation in this respect depends entirely upon the commission of an unfair labor practice under section 8(a)(5).

[3] The International and Long Beach Local 1-128 cooperated in the bargaining effort here in question. Following the practice of the parties and the trial examiner, we will refer to both organizations collectively as "the union."

other manner with its employees' rights under section 7 of the Act, 29 U.S.C. §157 (1964). Reinstatement of all employees who had engaged in the strike referred to above was also ordered, as was posting of the usual notices announcing compliance with the Board's order.

I. THE WITHHOLDING OF VACATION PAY

The Board's ruling with respect to the withholding of vacation pay on discriminatory grounds is not challenged here by the company, and therefore that portion of the Board's order which relates to that violation must be enforced.

II. THE REFUSAL TO BARGAIN

MacMillan urges several objections to the Board's finding that it refused to bargain in good faith. Its primary contention, however, concerns the requirement of section 10(b) of the Act, 29 U.S.C. §160(b) (1964), that

> "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made . . . ."

A. The Period Between May 10, 1964, and September 8, 1964

Although the negotiations and other events bearing on the findings of the Board date back to 1960, the complaint involved here is based on a charge filed by the union on November 10, 1964. Thus the Board's finding of a refusal to bargain can apply literally only to the period following May 10, 1964, and the conclusion that such a refusal occurred during that period must be supported by substantial evidence. Moreover, since the strike commencing on September 8, 1964, was found to be a result of such a refusal, similar support must exist for a finding that the

prohibited conduct occurred prior to that date if the Board's order is to be enforced *in toto*.

It is uncontradicted that the company did very little between May 10 and September 8, 1964, which could conceivably constitute a refusal to bargain. The principal reason for this circumstance is that on May 7, 1964, the parties consented to postpone bargaining during the pendency of industry-wide negotiations; this postponement was agreed upon in order that the International and the majority of the industry might reach a settlement that could be used by the parties to measure their respective economic proposals. It is admitted by the Board that while negotiations were thus suspended the company did not improperly refuse to bargain.

Only on September 2, 1964, did MacMillan begin to engage in conduct which, if combined with a subjective intent to avoid reaching an agreement, might constitute a violation of section 8(a)(5). On that day the parties met and the company submitted what was termed its "final proposal," – a suggested contract that differed very little from those which it had previously submitted. In addition, when the union's representative indicated in response that a strike would be called unless agreement were reached within a week, the company's negotiator asked, "Haven't you had enough yet?" The trial examiner took this response to represent a suggestion that the company had thus far defeated the union's efforts to conclude an agreement and that continued efforts would lead only to "more of the same." There is no evidence of any other occurrence immediately prior to initiation of the September 8 strike which could conceivably support the Board's finding of a refusal to bargain.

We have no hesitation in holding that, standing alone, the evidence just outlined is plainly insufficient to support the Board's conclusion that the company violated section 8(a)(5). Such violations depend essentially upon

whether or not the party in question genuinely desires to reach an agreement, and the mere fact that MacMillan had not budged from its earlier position on most issues cannot (without substantial evidence that the company's attitude was inconsistent with its duty to seek an agreement) suffice to render it culpable.[4] See, *e.g., NLRB v. Almeida Bus Lines, Inc.*, 333 F.2d 729, 731 (1st Cir. 1964). Furthermore, we have serious doubts concerning the significance of the remark made by the company's negotiator. That comment would seem at most to be ambiguous; the union had been involved in earlier strikes against MacMillan, whose representative may well have been asking whether the union had not "had enough" of the difficulties that inevitably accompany such economic action. Thus interpreted, the remark would seem a natural response to the sort of strike ultimatum which the union had just delivered. Under the trial examiner's interpretation, on the other hand, the comment seems somewhat out of context – as if the union had just extended, rather than drastically reduced, the time it was allowing the company before it would call a strike. That comment, then, is far too insubstantial a foundation for the Board's finding of a section 8(a)(5) violation.

B. The "Strike Pay" Proposal of December 4, 1964

Nor does consideration of the company's proposal of December 4, 1964, yield support for that finding.

The portion of that proposal relied upon by the Board was a "strike pay" provision, which would have required *the union* to pay their employees their full salary during any period in which they were on strike – a requirement which was to extend for a year after

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[4] It may be noted that throughout the entire course of negotiations the union likewise remained adamant, refusing to retreat to any substantial extent from its original proposals on most issues.

expiration of the proposed contract period. For our purposes the propriety of weighing this post-charge proposal in judging the company's motivation (even prior to September 8, 1964) may be conceded. See *NLRB v. Fant Milling Co.*, 360 U. S. 301 (1959). We may also assume arguendo that in certain exceptional cases the extreme or bizarre character of a party's proposals may give rise to a persuasive inference that they were made only as a delaying tactic or that they should be viewed as a facade concealing an intention to avoid reaching any agreement. Such is the suggestion of *NLRB v. Reed & Prince Mfg. Co.*, 205 F.2d 131, 139 (1st Cir.), *cert. denied*, 346 U. S. 887 (1953), and *Vanderbilt Prods., Inc. v. NLRB*, 297 F.2d 833, 834 (2d Cir. 1961). We believe, however, that such a principle, if accepted at all, must be narrowly restricted. Otherwise, the policy supporting section 8(d)'s provision that the duty to bargain in good faith does not "require the making of a concession" would be undermined, if not more.

This provision has been interpreted by the Supreme Court to require that

> "The Board may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements." *NLRB v. American Nat'l Ins. Co.*, 343 U. S. 395, 404 (1952).

We do not believe that the circumstances here are so compelling that the thrust of this requirement can justifiably be avoided. In the *Reed & Prince* case, not merely a single proposal, but the entire contract insisted on by the employer was characterized by the court as one which the employer could not "with a straight face and in good faith" have considered acceptable to any "self-respecting union." 205 F.2d at 139. Moreover, several other evidentiary factors were fairly relied upon in that case as indicating the existence of a bargaining attitude

impermissible under section 8(a)(5). And in the *Vanderbilt* case, the employer not only incorporated an extensive set of "terms which no 'self-respecting union' could brook" into its substantive proposal, but also "condition[ed] all negotiations upon the acceptance" of all such terms. 297 F.2d at 833. Here, the single provision in question, offered in response to initiation of the union's strike, was proposed once and "never 'referred to again by the Company'." C.T. 56. We do not feel that the approach of the *Reed & Prince* and *Vanderbilt* decisions can, consistently with the provision of section 8(d) referred to above, be extended to such circumstances. Hence, even considered along with the evidence previously recounted, the December 4 proposal clearly does not provide sufficient support for a finding that MacMillan refused to bargain at any time, either before or after September 8, 1964.

C. The History of Negotiations Prior to May 10, 1964

The Board viewed the conduct thus far set out, however, "in light of" events which took place before May 10, 1964. And it may be conceded that the long history of the parties' negotiations, heavily relied upon by the Board, casts a certain amount of doubt on the good faith of the company. Three illustrative points may be referred to briefly in this regard.

First, the company moved with a pronounced lack of promptness in certain portions of the negotiations. The trial examiner found that at a December 13, 1963, meeting, the company's negotiator was asked if he was prepared to submit his "final proposal"; he stated that he was not, but that he would contact the union just after Christmas in order to arrange a meeting. Despite an inquiry by the union in March 1964, however, the company did not arrange to hold such a meeting until May 7, 1964, and then only on the union's immediate initiative. The Board has ruled that the Act

> "does not permit an employer to secure . . . a dominant position at the bargaining table by means of unreasonable delay." *Burgie Vinegar Co.*, 71 N.L.R.B. 829, 830 (1946); *cf. NLRB v. Mrs. Fay's Pies*, 341 F.2d 489, 492 (9th Cir. 1965).

Second, in February 1964 the company unilaterally notified employees of a "grant" of increased vacation benefits almost identical to benefits proposed by the union in 1961 (and rejected at that time by MacMillan). Furthermore, the trial examiner found that the notification was intentionally made in a manner and using language calculated to raise doubts in the minds of employees as to whether the union was effectively representing them. Commenting on similar conduct in *NLRB v. Generac Corp.*, 354 F.2d 625, 628 (1965), the Seventh Circuit quoted its opinion in *Inland Lime & Stone Co. v. NLRB*, 119 F.2d 20, 22 (1941), as follows:

> "This action was more than merely tactless. It evidenced a wilful and deliberate contempt for the whole plan of collective bargaining. It was fairly inferable that the employer, by this action, intended to humiliate the Union representatives and discredit them in the eyes of their fellow employees. It reflected on the alleged good faith of [the employer's] recognition of the Union as a bargaining agent." *See also NLRB v. Reed & Prince Mfg. Co.*, 205 F.2d 131, 139 (1st Cir.), *cert. denied*, 346 U. S. 887 (1953).

Third, the company's negotiators were found to be to some extent contradictory and evasive when responding to questions concerning the reasons for some of their more severe proposals. This reaction was taken by the trial examiner as at least some indication that MacMillan's motives in making certain of those proposals were inconsistent with the attitude required by section 8(a)(5).

> "Good-faith bargaining necessarily requires that claims made by either bargainer should be honest claims." *NLRB v. Truitt Mfg. Co.*, 351 U. S. 149, 152 (1956).

It is claimed that these "background" factors, and some few others which we have not recited, considered together with the evidence mentioned earlier, would provide a sufficient foundation for the Board's finding of a refusal to bargain. In view of the marked insubstantiality of that earlier-discussed evidence, however, it is plain that the principal support for that finding would necessarily come from the "background" – that is, from evidence antedating May 10, 1964. Hence we must determine whether primary reliance upon such evidence is consistent with the terms and policies of section 10(b) of the Act.

Section 10(b) has been characterized as "a statute of limitations, and not a rule of evidence." *Local 1421, IAM v. NLRB*, 362 U. S. 411, 415 (1960). And literally, of course, the violation found by the Board "occurred" within the specified six-month period before the filing of the charge. The same considerations were thought insufficient by the Supreme Court, however, to determine in *Local 1424, IAM v. NLRB, supra,* an issue quite similar to that now presented to us.

In the *IAM* case, the question before the Court concerned the validity of a bargaining agreement under sections 7 and 8 of the Act. The Court stated that under those sections

> "the Board has evolved the principle, not drawn into question here, that it is an unfair labor practice for an employer and a labor organization to enter into a collective bargaining agreement which contains a union security clause, if at the time of original execution the union does not represent a majority of the employees in the unit. The maintaining of such an agreement in force is a continuing violation of the Act, and

> the 'majority status' of the union at any subsequent date – including the date of execution of any renewals of the original agreement – is immaterial, for it is presumed that subsequent acquisition of a majority status is attributable to the earlier unlawful assistance received from the original agreement." 362 U. S. at 413-14 (footnotes omitted).

In *IAM* the petitioners' action in allowing such an agreement to remain in force had been found by the Board to constitute an unfair labor practice under the above principle, on the sole ground that the union in question had represented only a minority of employees at the time the agreement was originally signed. The charge had been filed while the contract was in effect, but more than six months after the original signing.

In approaching the question of section 10(b)'s application, the Court stated that

> "due regard for the purposes of §10(b) requires that two different kinds of situations be distinguished. The first is one where occurrences within the six-month limitations period in and of themselves may constitute, as a substantive matter, unfair labor practices. There, earlier events may be utilized to shed light on the true character of matters occurring within the limitations period; and for that purpose §10(b) ordinarily does not bar such evidentiary use of anterior events. The second situation is that where conduct occurring within the limitations period can be charged to be an unfair labor practice only through reliance on an earlier unfair labor practice. There the use of the earlier unfair labor practice is not merely 'evidentiary,' since it does not simply lay bare a putative current unfair labor practice. Rather, it serves to cloak with illegality

that which was otherwise lawful." 362 U. S. at 416-17 (footnote omitted).

The Court held that the case before it fell within the second category and that the charge therefore was not timely filed:

> "Where, as here, a collective bargaining agreement and its enforcement are both perfectly lawful on the face of things, and an unfair labor practice cannot be made out except by reliance on the fact of the agreement's original unlawful execution, an event which, because of limitations, cannot itself be made the subject of an unfair labor practice complaint, we think that permitting resort to the principle that §10(b) is not a rule of evidence, in order to convert what is otherwise legal into something illegal, would vitiate the policies underlying that section." 362 U. S. at 419.

This holding is not directly in point (although the company charges that the Board is utilizing "background evidence" to "convert what is otherwise legal into something illegal"). For the case before us actually falls into neither of the two categories described above by the Court, but into another class which its opinion mentioned in passing:

> "Indeed, some Board cases have gone even further and held §10(b) a bar in circumstances when, although none of the material elements of the charge in a timely complaint need necessarily be proved through reference to the barred period – so that utilization of evidence from that period is ostensibly only for the purpose of giving color to what is involved in the complaint – yet the evidence in fact marshalled from within the six-month period is not substantial, and the merit of the allegations in the

> complaint is shown largely by reliance on the earlier events. See, *e.g., News Printing Co.*, 116 N.L.R.B. 210, 212 [1956]; *Universal Oil Products Co.*, 108 N.L.R.B. 68 [1954]; *Tennessee Knitting Mills, Inc.*, 88 N.L.R.B. 1103 [1950]." 362 U. S. at 421.

The *IAM* opinion expressly refrained from passing judgment on the rule thus applied by the Board in the cases cited.[5] In resolving the conflict between that rule and the action of the Board in this case, we feel – although the question is not without difficulty – that the thrust of the Court's reasoning in *IAM* calls for endorsement of the *News Printing-Universal Oil-Tennessee Knitting Mills* doctrine, and we hold accordingly that the Board's finding of a refusal to bargain here is unjustified.

The *IAM* decision rested on an evaluation of the "policies underlying" section 10(b), which were described as follows:

> "to bar litigation over past events 'after records have been destroyed, witnesses have gone elsewhere, and recollections of the events in question have become dim and confused.' H. R. Rep. No. 245, 80th Cong., 1st Sess., p. 40, and of course to stabilize existing bargaining relationships." 362 U. S. at 419 (footnote omitted).

Presumably the Court thought that the stabilization of existing bargaining relationships called for the validation of a

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[5] *But cf.* the somewhat puzzling comment, contained in a footnote to the Court's opinion, asserting that possible doubt as to the soundness of such decisions

> "does not impair the accuracy of the proposition that however marshalled, *acts* within the limitations period must under Board doctrine yield some substantial evidence of unlawful conduct," 362 U. S. at 422 n. 13 (emphasis added).

recognition and negotiation arrangement which had been de facto operative for over six months. In a broader sense, however, it should be recognized that the stability of such relationships is hardly enhanced by the possibility that one party may dredge up events of years past, in the guise of "evidence" designed to "shed light" on more recent conduct, and base unfair labor practice charges substantially upon such bygone events. Furthermore, in spite of the characterization of section 10(b) as a "statute of limitations," we think that to allow the Board to find a violation where the only substantial evidence supporting that finding is drawn from events occurring prior to the allowable six-month period would violate the section's clear purpose

> "to bar litigation over past events 'after records have been destroyed, witnesses have gone elsewhere, and recollections of the events in question have become dim and confused,' . . . . "

The nature of the Act is such that unfair labor practices depend generally upon the existence of some illicit intent, proof of which often involves inferences drawn from conduct over a long period of time. Here, for instance, much of the evidence in question antedated the charge by more than three years. Even longer delays are by no means inconceivable. When such evidence provides the principal foundation for an unfair labor practice claim, the fact that the claim "technically" dates back only six months fails to deal adequately with reality. To allow primary reliance on evidence drawn from a time prior to the limitations period cannot, therefore, be reconciled with the thrust of section 10(b), and we endorse the Board decisions which so hold.

To recapitulate, then, we hold that while evidence of events occurring more than six months before the filing of a charge may be used to "shed light" upon events taking place within the six-month period, the evidence of a violation drawn from within that period must be

reasonably substantial in its own right.[6] Where, as here, that condition is not met, it is impermissible under the policies embodied in section 10(b) for a finding of an unfair labor practice to be justified by primary reliance on the earlier events. Thus the Board's conclusion that MacMillan improperly refused to bargain with the union during the applicable limitations period cannot be upheld.

The order of the Board is enforced only insofar as it relates to the discriminatory withholding of vacation pay. Enforcement of the order is denied with respect to the finding of a refusal to bargain.

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[6] We use the term "substantial" merely in the sense of "significant" or "not inconsiderable," and do not of course intend to indicate that the evidence drawn from within the limitations period must of itself be sufficient to sustain an unfair labor practice finding in enforcement proceedings.

* * * * *

DECREE

Before: Barnes, Hamley and Koelsch, Circuit Judges

THIS CAUSE came on to be heard upon the petition of the National Labor Relations Board for enforcement of its Order dated September 2, 1966, against the above-named Respondent, MacMillan Ring-Free Oil Co., Inc., its officers, agents, successors, and assigns. The Court heard argument of respective counsel on February 8, 1968, and has considered the briefs and transcript of record filed in this cause. On April 10, 1968, the Court, being fully advised in the premises handed down its opinion granting in part and denying in part enforcement of the Board's Order. In conformity therewith, it is hereby

ORDERED, ADJUDGED AND DECREED by the Court that Respondent, MacMillan Ring-Free Oil Co., Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership of any of its employees in Oil, Chemical and Atomic Workers International Union, AFL-CIO, or in any other labor organization, by denying or withholding from any employee any privilege, benefit, money or other thing of value due him, because of his membership in, or activities with, or on behalf of, any labor organization.

(b) In any other manner interfering with, restraining or coercing employees in the exercise of any rights guaranteed them by Section 7 of the National Labor Relations Act, as amended.

2. Take the following affirmative action which the Board has found will effectuate the policies of the Act.

(a) Post in conspicuous places at its place of business in Signal Hill, California, including all places there where notices to employees are customarily posted, copies of the said notice attached hereto and marked "Appendix." Copies of said notice, to be furnished by the Regional Director of the Twenty-first Region of the National Labor Relations Board (Los Angeles, California), shall, after being signed by a duly authorized representative of the Company, be posted by it immediately upon receipt thereof, and maintained by it for 60 consecutive days thereafter in such conspicuous places. Reasonable steps shall be taken by the said Company to insure that said notices are not altered, defaced or covered by any other material.

(b) Notify the said Regional Director in writing within 10 days from the date of this Decree what steps the Respondent has taken to comply therewith.

Endorsed, Decree Filed and Entered
May 1, 1968

/s/ William B. Luck

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A Decree of the United States Court of Appeals Enforcing in part an Order of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

> WE WILL NOT discourage membership of any of our employees in OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION, AFL-CIO, or in any other labor organization, by denying or withholding from any employee any privilege, benefit, money or other thing of value due him, because of his membership in, or activities with, or on behalf of, any labor organization.
>
> WE WILL NOT in any other manner interfere with, restrain or coerce any of our employees in the exercise of any rights guaranteed them by Section 7 of the said Act.

MACMILLAN RING-FREE OIL CO., INC.

Dated _____ By _____
(Representative) (Title)

This notice must remain posted for 60 days from the date of posting and must not be altered, defaced, or covered by any other material.

Information regarding the provisions of this notice and compliance with its terms may be secured from the Regional Office of the National Labor Relations Board, 849 So. Broadway, Los Angeles, California 90014 (Telephone No. 688-5205).

160 NLRB No. 70

D-9123
Signal Hill, Calif.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

MACMILLAN RING-FREE OIL CO., INC.,
A CORPORATION

and

Case No. 21-CA-6299

OIL, CHEMICAL AND ATOMIC WORKERS
INTERNATIONAL UNION, LONG BEACH
LOCAL 1-128

DECISION AND ORDER

On April 13, 1966, Trial Examiner Herman Marx issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. He further found that the Respondent had not engaged in certain other unfair labor practices alleged in the complaint and recommended that they be dismissed. Thereafter, the Respondent filed exceptions to the Trial Examiner's Decision and a supporting brief, the Charging Party filed cross-exceptions and an answering brief, and the General Counsel filed cross-exceptions and a reply brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings made by the Trial Examiner at the hearing and finds that no prejudicial error

was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions, the briefs, and the entire record in this case, and hereby adopts the findings,[1] conclusions, and recommendations of the Trial Examiner.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the Recommended Order of the Trial Examiner, as modified below, and hereby orders that the Respondent, MacMillan Ring-Free Oil Co., Inc., Signal Hill, California, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order, as herein modified:

1. Add the following as paragraph 2(c), the present paragraph 2(c) and those subsequent thereto being consecutively relettered:

"(c) Notify the above-described employees, if presently serving in the Armed Forces of the United States, of their right to full reinstatement upon application, in accordance with the Selective Service Act and the Universal Military Training and Service Act of 1948, as amended, after discharge from the Armed Forces."

2. Add the following immediately above the line at the bottom of the Appendix attached to the Trial Examiner's Decision:

NOTE: We will notify the above-described employees, if presently serving in the Armed Forces of the United States, of their right to full reinstatement upon application,

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[1] The Trial Examiner inadvertently stated that Howard Elliot testified that Robert Hunter threw a stone on company property. The record, however, indicates that Phillip Carter so testified.

in accordance with the Universal Military Training and Service Act of 1948, as amended, after discharge from the Armed Forces.

Dated, Washington, D. C. September 2, 1966.

/s/ Frank W. McCulloch, Chairman
/s/ John H. Fanning, Member
/s/ Howard Jenkins, Jr., Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX D

* * * * *

DECISION OF THE TRIAL EXAMINER

Statement of the Case

The complaint, as amended, alleges, in material substance, that the Respondent, MacMillan Ring-Free Oil Co. Inc. (herein MacMillan or the Company), has refused to bargain in good faith with a labor organization as the duly designated representative of an appropriate bargaining unit of the Company's employees, thereby violating Section 8(a)(5) of the National Labor Relations Act, as amended (29 U.S.C. Sec. 151, *et seq.*; also called the Act herein); has discriminated against employees, in violation of Section 8(a)(3) of the Act, by withholding vacation pay due them, because of their union membership and activities, and by conditioning employment upon withdrawal of employees from union membership; has, by such conduct, abridged rights guaranteed employees by Section 7 of the Act, thereby violating Section 8(a)(1) of the statute; and has, by such unfair labor practices, caused and prolonged a strike among employees of the Company.[1]

The Respondent has filed an answer denying, in material substance, that it committed the unfair labor practices imputed to it, and that its employees engaged in a strike caused or prolonged by any such unfair labor practices.

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[1] The complaint in this proceeding is dated August 11, 1965; was amended on September 15, 1965; and is based upon a charge filed on November 10, 1964. Copies of the charge, the complaint, and the amendment to the complaint have been duly served upon the Respondent. A hearing upon the issues was held in Los Angeles, California, beginning on November 3, 1965, and concluding on November 11, 1965.

Pursuant to notice duly served upon the Respondent and the Charging Party, a labor organization named Oil, Chemical and Atomic Workers International Union, Long Beach Local 1-128 (herein the Local) by the General Counsel of the National Labor Relations Board, a hearing upon the issues in this proceeding has been held before me, as duly designated Trial Examiner, at Los Angeles, California. Each of the parties appeared through, and was represented by, counsel, and was afforded a full opportunity to be heard, examine and cross-examine witnesses, adduce evidence, file briefs, and submit oral argument. Since the close of the hearing, the parties have entered into a stipulation amending the transcript of the hearing in the respects set forth in the stipulation, which is hereby made a part of the record. The hearing record contains other transcription errors, but as these do not affect the material facts and issues, I deem it unnecessary, in the absence of a motion by any party, to make any additional amendments to the transcript.

Upon the entire record, from my observation of the witnesses, and having read and considered the respective briefs of the parties filed with me since the conclusion of the hearing, I make the following findings of fact:

Findings of Fact

I. Nature of the Respondent's business; jurisdiction of the Board.

MacMillan is a corporation; is engaged in the business of refining and marketing petroleum products at facilities located in various states, including a plant for refining such products at Signal Hill, California; and is, and has been at all material times, an employer within the meaning of Section 2(2) of the Act. The issues here center on the Signal Hill plant.

In the course and conduct of its business, MacMillan annually purchases and receives directly from places located outside the State of California products, materials and supplies valued in excess of $50,000, for use at its Signal Hill facility, and annually ships products valued in excess of $50,000 from that location directly to places outside the State of California. By reason of such interstate transactions, MacMillan is, and has been at all times material to the issues, engaged in commerce within the purview of Sections 2(6) and 2(7) of the Act. Accordingly, the National Labor Relations Board has jurisdiction over the subject matter of this proceeding.

II. The labor organizations involved

The Local is an affiliate of Chemical and Atomic Workers International Union, AFL-CIO (herein the International). Employees participate in each organization; each exists for the purpose, in whole or in part, of dealing with employers concerning wages, hours of work and other terms and conditions of employment; and each is, and has been at all material times, a labor organization within the meaning of Section 2(5) of the Act.

III. The alleged unfair labor practices

A. Prefatory statement

On July 21, 1960, based upon the results of a representation election, the National Labor Relations Board (herein the Board) certified the International as the bargaining representative of the employees in a bargaining unit consisting (except for customary production unit exclusions) of "(a) 11 production and maintenance employees including stillmen, loaders, laborers and utilitymen, and all laboratory testers" employed at the Signal Hill facility.

About a month later, the Local sponsored a work stoppage in the Signal Hill refinery to secure satisfaction of a

"request" (not explicated in the record), giving the management a little over an hour's advance notice of the stoppage. The participating employees left their work stations without shutting down the refinery equipment, and returned to work about 15 minutes later when the request was met.

On November 18, 1960, the International and the Local entered into a contract with the Company. The agreement, collectively describing both labor organizations as the "Union," stated that the Company recognized the "Union" as the exclusive bargaining representative of a unit of employees substantially the same, for all practical purposes as the one embraced in the certification described above); prescribed wages, hours of work, and other terms and conditions of employment for such employees; required membership in the International (after the expiration of the statutory grace period) as a condition of employment, and a check-off of union dues; prohibited strikes, work stoppages and lockouts during the period of the contract, provided there was compliance with its terms, and subject to the exception that employees would not be required to work "under unsafe conditions;" obligated the Union to "use every effort and means at its disposal to prevent the interruption or cessation of work by any of its members;" and provided grievance and arbitration procedures. The contract, by its terms, was to remain in effect until October 31, 1961, "and from year to year thereafter" subject to prescribed notice provisions for amendment or termination; permitted each party to "reopen" the wage provisions by serving a prescribed 60-day written notice upon the other; and provided that the contract would "terminate" if no wage agreement were reached within the 60 days, unless the parties agreed to extend the contract "for a specific period for the purpose of continuing negotiations." (As in the contract and various contract proposals in evidence, the term "Union," as used below, is, unless the context otherwise indicates, a collective reference to the International and the Local.)

The Union "reopened" the wage provisions with the requisite notice in December 1960, and this led to wage discussions, in which the Company was represented, as well as in subsequent negotiations out of which the issues in this proceeding arose, by a labor relations consultant, Henry W. Becker, and management personnel; and the Union by a representative of the International, George Cody, and a negotiating committee of employees. Throughout all the negotiations relevant here, Messrs. Becker and Cody were the spokesmen for their respective sides.

No agreement was reached within the prescribed 60 days, and at some point thereafter in February 1961, to avoid termination of the contract under its "reopener" provisions, the parties agreed to keep it in force subject to a right by either side to terminate it on 72 hours' notice. As of March 8, 1961, the parties were still in disagreement, and on that date, the Union gave the Company the prescribed notice of termination. They agreed, however, on the evening of Friday, March 10, that a "status quo condition" would be maintained over the weekend pending a negotiating meeting scheduled for Monday, March 13. On Friday evening, following the "status quo" arrangement, as Mr. Cody testified without dispute, the Company "brought in additional trucks to haul out the finished products on that evening." The Union took that to be a breach by the Company of the "status quo" commitment, and as a result, a work stoppage began Friday night, the employees leaving their posts after about 15 minutes' advance notice to the management by a member of their negotiating committee, and without a prior shutdown of the equipment, which continued to operate until brought to a halt, principally by management personnel, some hours later. As the refinery superintendent, Bruce May, testified, it would take a full crew some four or five hours to effect an "orderly" shutdown of the refinery operations, and leaving the equipment unattended without previously shutting down the operations in "orderly" fashion creates a hazard

of fire and other damage. The Company, Mr. May testified without contradiction, "lost about $1,000 worth of products" because operating equipment was left unattended, without a proper shutdown, by the employees who walked out. The employees returned to work on Monday, March 13, and an agreement for wage increases was reached on or about that date, the parties incorporating it as an addendum to the 1960 contract.

On April 17, 1961, based upon the result of a representation election, the Board certified the International as the bargaining representative of a unit of employees (and another unit of no relevance here), consisting of "all plant clericals, including loading clerks and oil house clerks" (with various exclusions that are of no moment.)

Notwithstanding the separate units embraced by the two certifications, the record as a whole, including a stipulation of the parties at the hearing, and the history of contract discussions and proposals since the second certification, warrants a fusion of material portions of both units into one as an appropriate basis for bargaining, and thus I find that "(a) 11 production and maintenance employees, including stillmen, loaders, laborers, utilitymen, and all laboratory testers and loading clerks," employed by the Company at its facility in Signal Hill, California, "excluding all office clerical employees, guards, professional employees and supervisors as defined in the Act," constitute, and have constituted at all times material to this proceeding, a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act.[2]

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[2] The unit finding made above follows the stipulation except for the inclusion of loading clerks. The Respondent declined to agree to their inclusion on the ground that it had not employed such clerks for some time. However, as previously noted, the International has been the certified representative of such employees since April 17, 1961 (G.C. Exh. 2), and, in common with the other employees in the unit, they have been the subject of

(Continued)

The complaint alleges that the Local is the representative of the unit, but this, it seems to me, reflects an inaccurate conception of the record. It is true that the Local was a party to the 1960 contract, was jointly recognized there with the International as "the Union" representing the unit employees covered by the contract, and appears in that capacity in later agreements and contract proposals, but its identification in the record as part of "the Union," was, for all that appears, simply the product of acquiescence by the International and the Respondent. Throughout almost four years of negotiations beginning in June 1961, which, as will appear in detail later, serve as the background of the bargaining allegations of the complaint, the spokesman for "the Union," and obviously its dominant figure, was a representative of the International, and, what is more, the only union security arrangement that ever existed between "the Union" and the Company, the one set forth in the 1960 contract, requires membership in the International, and not in the Local, but more to the point, the critical fact is that the International is the *certified* representative of the unit, and that the two certifications that created that status have never been revoked or amended and are still in effect, and I can see no reason to deny their continuing reach, read together, as certificates of the status of the International as the exclusive representative of the employees in the relevant bargaining unit. To give the certifications that effect here, does, to be sure, entail a variance from the representation allegations of the complaint, but I find no prejudice to any party as a result. Indeed, the evidence of the certifications

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[2] (Continued)

contract discussions between the Union and the Company, and of proposals submitted by each. There is no evidence that the inclusion of the loading clerks in the relevant unit in any way prejudices the Company, and the unit and negotiating history amply warrants their continuing inclusion, especially as there is nothing to prevent the Company from resuming the employment of such clerks at any time it chooses.

is in the record by stipulation of all the parties. Obviously, the Respondent has known about them from their inception, having participated in the representation proceedings which produced them, not to speak of the fact that notwithstanding the inclusion of the Local as part of "the Union" identified in contracts and proposals as the employees' representative, it was obviously the International, through its representative, that spoke both for itself and the Local in the years of negotiation that began in June 1961. I find, in short, that the International has been at all times material to the issues here, and is now, the exclusive bargaining representative, within the meaning of Section 9(a) of the Act, of all employees in the unit found above to be appropriate for bargaining purposes.

On April 28, 1961, a strike, called or at least supported by the Union, began among the employees in the bargaining unit it represents. So far as can be determined from the record, the walkout arose out of a dispute between the management and union representatives over the wage rate paid an employee and "two other items" not explicated in the record. One may infer that the existing contractual grievance procedures were applicable to the wage dispute, at least, but the grievance machinery was not invoked to resolve the controversy, or at least not used to completion.

The management had about an hour's advance notice of the strike, and prior to its start, Mr. Becker reminded a business agent of the Local, Robert Brown, of the contractual prohibition of strikes, suggesting the use of the grievance machinery, and Mr. Brown replied, in substance, that he had done what he could to defer the strike, and would try to do so again if the Company raised the wage rate of the employee in question. Mr. Becker stated that he could not agree without knowledge of the type of work the employee was performing, and that ended the discussion.

The strike followed shortly thereafter, the strikers leaving their posts, without shutting down the refinery operations, a task that was completed by Mr. May and two non-striking employees. Because of the omission, as Mr. May testified without dispute, the Company "lost about $2,000 worth of material" before the shutdown could be effected.

The strike was ended in mid-June 1961 by force of a "strike settlement agreement," dated June 13, 1961, between the Union and the Company, which provided, among other things, that the contract of November 18, 1960, as amended, was "mutually terminated," and that the parties "meet as quickly as possible for the purpose of negotiating a new labor agreement."

Thereafter, the Union and the Company, each represented as previously noted, held 22 meetings for the discussion of contract terms prior to the commencement of a strike at the Signal Hill facility on September 8, 1964, which was still in progress at the time of the hearing in this proceeding, the first of these meetings taking place on June 22, 1961, shortly after the strike settlement agreement, and the last on September 4, 1964. In addition, there have been 10 negotiating meetings during the strike, the last on April 2, 1965. Despite the numerous meetings, spread over a period of almost four years, no "new labor agreement" has been reached, although the parties, in circumstances to be described later, did negotiate a wage increase early in 1963, and in the following year, the Company put into effect an added vacation benefit proposed by the Union in 1961.

The primary issue in this case is whether the Company, as the General Counsel contends, has refused to bargain in good faith by following a course of conduct during the negotiations, reflected in proposals it made and positions it took, designed not to conclude a collective bargaining agreement but to avoid it and to undermine the employees' bargaining representative; or whether, as the Respondent maintains, in substance, that it bargained in good faith to an impasse on the issues that divided the parties.

Needless to say, as the charge in this proceeding was filed and served on November 10, 1964, in view of the six-month limitation prescribed by Section 10(b) of the Act, findings that the Respondent unlawfully refused to bargain, if warranted, must be based on events since May 10, 1964, but, contrary to a position taken by the Respondent at the hearing, and noted again in its brief, prior events, including proposals and contract discussions, "may be utilized to shed light on the true character of matters occurring within the limitation period"(Local 1424), *International Association of Machinists v. N.L.R.B.*, 362 U. S. 411, 416). In the findings that follow, that is the role of the events that antedated "the limitation period."

B. The negotiations and the strike[3]

At the first, second and third negotiating meetings (June 22 and 28 and July 20, 1961), the Union proposed that the parties re-adopt the terminated contract (referred to below, as amended, as the 1960 contract), and, also, at the initial meeting, that employees with 20 or more years of service be given a fourth week of paid vacation in addition to the three weeks allowed them under the 1960 contract. Neither proposal was adopted, the Company stating that it "could not afford" the added vacation benefit.

At the fourth meeting (July 27, 1961), the Company submitted a proposed contract to the Union. Fourteen

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[3] As may be expected with so many meetings over so long a period, the record of the negotiations is voluminous, each side giving its version of many matters, with attendant differences in emphasis and detail. Understandably, I omit various details that, in my view, cannot possibly affect the results and would, by review here, only add encumbrance to an already heavily burdened record, although I include other details of no particular significance to facilitate conversion of a complex, and at times confusing, record into a narrative account connecting and setting forth the findings and conclusions on the material issues.

of the 28 articles of the terminated contract were either identically or in substance incorporated in the 27 articles of the proposal, together with a schedule of wage rates paid under the prior agreement to the employees it covcovered.[4]

However, some or all of the substance of the other 13 articles of the proposal reflected material departures from the 1960 contract, taking the form of omission of two whole articles of that agreement, the incorporation of others with substantial alterations, and the addition of a completely new article.

The two omitted articles were Article IV, the union dues check-off provision, and Article XXIII, which provides that employees, within prescribed limitations, be compensated for working time lost in settling grievances and serving in contract negotiations as members of the Union's negotiating committee.

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[4] The articles of the 1960 contract thus incorporated were Article I (Recognition, with a minor modification in unit description to include driver-salesmen and oil house clerks, for whom the Local had become the certified representative); Article V (Hours of Work); Article VII (Holidays, with an insubstantial language change); Article VIII (Vacations); Article X (Wage Rates and Classification Changes); Article XVII (Sick Leave); Article XVIII (Military Service); Article XIX (Jury Duty); Article XX (Death in Immediate Family); Article XXI (Clothing Allowance); Article XXII (Validity); Article XXIV (Maintenance of Existing Benefits); Article XXVII (Physical Examinations); Article XXVIII (Notices). The proposal also included rates for four classifications (emulsion operator, loading clerks, oil house clerks, and driver-salesmen) not covered by the former contract, but it does not appear whether these rates, like the others, were already in effect. In any case, wage rate proposals for the driver-salesmen and oil house clerks were eliminated from the negotiations when it developed at one meeting or another that the Company no longer employed such personnel. Also, as noted earlier, the Company has not employed loading clerks for some time.

The entirely new article in the proposal (Article XV, labelled "General Provisions") which, together with a related appendix, would establish a list of 35 "rule infractions" as "sufficient grounds" for discipline, including discharge, "in the judgment" of the management; and empower it, in its discretion, to add to or alter the list to any extent not in conflict with any other contractual terms. At the eighth negotiating meeting (September 26, 1961), Mr. Becker told Mr. Cody, in substance, that the exercise of the management's judgment in applying any of the 35 rules to discharge or otherwise discipline an employee would not be subject to arbitration, irrespective of any other provision in the proposal (or, in other words, notwithstanding a requirement of the grievance and arbitration article, taken from the 1960 contract, that discharge or other disciplinary action "shall be only for just cause").

The material changes in the 1960 contract, as set forth in the Company's proposal, included deletion of the wage "reopener" provisions; a requirement that, in prescribed circumstances, union members maintain membership as a condition of employment, instead of the former "union shop" provision that all unit employees (subject to the statutory grace period) become and remain members; a requirement that the management give employees a 24-hour notice of schedule changes instead of the prior provision for a 48-hour notice; a clause making a shift differential wage rate payable for day shift employees only for work after 6 p.m., instead of 4:30 p.m. as previously required; a change in the previous requirement for premium pay for work performed on a regularly scheduled day off to make such payment subject to a proviso that the employee work at least 40 hours in the week involved; changes in grievance-processing, including reduction in the time allotted the Union to take various grievance steps; language making the Company the "sole judge" of employees' qualifications in applying seniority provisions,

and requiring preferential hiring for laid off employees on the basis of qualifications for job openings; a requirement that management approval be secured of all material posted on the bulletin board provided for the Union under the prior contract, and that the management itself do the posting; conditioning leaves of absence for union business upon availability of replacements without involvement of overtime; deleting provisions prohibiting layoffs, demotions or reduction of work hours resulting from subcontract operations; modification of the strike prohibition to delete provisions making it dependent upon compliance with other contractual terms, and the exception of employees required to work under unsafe conditions; adding language vesting in the Company "sole discretion," without regard to the grievance procedures, to discharge or otherwise discipline employees who violate the strike prohibition, and obligating the Union to make a public declaration in event of a "wildcat strike" that it is unauthorized, and promptly order its members engaging in such a strike to return to work, irrespective of any picket line; and altering the previous "management rights" provisions to redefine and particularize rights reserved, and, unlike the former article, vesting "sole discretion" in the management "to maintain discipline among its employees."[5]

In the course of discussion with the Union's representatives, Mr. Becker told them that "irresponsibility" by the Union in calling strikes and breaching the strike prohibition of the 1960 contract was the reason for the maintenance of membership provision, in lieu of the "union shop" and check-off clauses; and that the "management rights" provisions would give the Company added protection in the light of a "trilogy" of Supreme Court

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[5] The description of changes is not exhaustive, although almost all have been noted. The relatively few omissions do not materially affect any results in this proceeding.

decisions.[6] The proposed revision of the strike prohibition, Mr. Becker also told the Union, stemmed from the fact that strikes had taken place, and the Company was seeking "some clause" to prevent future strikes. He said that the Company needed the "General Provisions" article, and the appended list of "rule infractions," or disciplinary rules, to give it better control over the employees; asserted that the proposed reduction in time allotted the Union for various grievance-processing steps would result in speedier dispositions; stated that the management sought the revision of the bulletin board article to give it "complete control" over the Union's board in the plant because "profane and scurrilous" material, and "attacks" on management personnel and others, had appeared on it after the 1961 strike; and expressed the view that contrary to the requirement of the 1960 contract, the management should not pay for time spent by employees in processing grievances, and that such a requirement "would be abused," and used irresponsibly by the Union.

For the other deviations from the 1960 contract described above, Mr. Becker, during the course of the discussions, advanced, as reasons, cost factors or considerations of efficiency or managerial flexibility. Thus, for example, he told the Union's representatives that the proposal removing all limitations on subcontracting (or, in other words, the omission of the prior contractual guarantee against layoffs, demotions, and hours reduction resulting from subcontracting) was sought in the interest of efficient operations, and because of Board decisions which, according to him, prohibit unilateral subcontracting; that payment of a shift differential to day shift employees for work after 4:30 p.m. required by the 1960

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[6] The "trilogy" refers, presumably, to *Steelworkers v. American Manufacturing Co.*, 363 U. S. 564; *Steelworkers v. Warrior & Gulf Co.*, 363 U. S. 574; and *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U. S. 593, all dealing with arbitration under collective bargaining agreements.

contract, instead of 6 p.m., as proposed, would result in "overtime on overtime" where the employees also received daily overtime for working after their regular shift hours; that the altered seniority provisions would promote efficiency; and that the omission of the "wage reopener" clause was designed to avoid any necessity to renegotiate wages soon after the conclusion of a contract prescribing wage rates.

As of the twelfth meeting, held on September 19, 1962, the parties were in disagreement on all of the departures from the 1960 contract, listed above. The differences are reflected in a draft of a proposed contract submitted by the Union to the Company on that date. With a few exceptions, the proposal substantially incorporates all of the terms of the 1960 contract, the modifications consisting, in substance, of the vacation benefit previously proposed by the Union; and amendment to the "Sick Leave" article increasing to 60 days, from the 45 specified in the 1960 contract, the permissible amount of accumulated sick leave; the inclusion of a clause in the "Maintenance of Existing Benefits" article providing for the continuation of a pension plan, with the expectation, as Mr. Cody informed the Company, that one would be provided; a requirement, not present in the 1960 contract, that the Company give two weeks' severance pay to "employees laid off" after "one year of service;" an addition to the "Hours of Work" article to provide time and one-half for the sixth and seventh consecutive days of work (the Union assigning as the reason that employees had been working as much as 10 consecutive days); and a pay scale that would increase the various hourly rates then in effect for unit employees by about 6%.

Passing the subjects of wage increases and pensions for later discussion, it is enough for present purposes to note that in the course of subsequent negotiations, the Union dropped its proposals for severance pay and an increase in sick leave accumulation; that the Company at one point

or another reiterated its opposition to the added vacation benefit and rejected the severance pay proposal, giving an economic reason for doing so; and that the differences between the Union and the Company over the departures in the Company's proposal of July 27, 1961 from the 1960 contract not only continued after the submission of the Union's written proposal, but were deepened by another draft of a proposed contract submitted by the Company at the next meeting, held on October 18, 1962.

In all but several respects, the terms of the second management proposal were either identically or in material substance the same as those of the first. In addition to a "management rights" article that set out reserved managerial rights with substantially greater specificity than that proposed by the Company in 1961, the second contract proposal omitted language contained in the Company's previously proposed grievance and arbitration article that discharge or disciplinary action "shall be only for just cause;" included a provision, not previously proposed, that "(w)here arbitration is sought and the Company claims the matter is not subject to the arbitration provisions of this Agreement, then the matter of arbitrability shall first be decided by a court of law;" and substituted "open shop" provisions for the maintenance of union membership article of the Company's first contract proposal.[7]

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[7] A few other differences between the first and second management proposals, consisting of a variance between the wage rates specified for loading clerks, of the omission from the wage schedules of the second proposal of several classifications listed in the first, and of a modification of the "Sick Leave" article to limit the Company's obligation in cases of compensable injury to the difference between an employee's award and what he would have received as sick leave pay have no material impact on the ultimate results here, although the "Sick Leave" modification was a subject of recrimination at one meeting or another, Mr. Becker charging that an employee had unjustly kept both an award and sick leave payments, and Mr. Cody stating that some aspects of the proposal would be unfair to

(Continued)

Either at the meeting of October 18, 1962 or the one that followed, Mr. Becker told the Union's representatives that the Company had previously been willing to agree to "some type of union security" and had thus proposed the maintenance of membership clause in lieu of the 1960 union shop provisions, but because of various "incidents" that had occurred in the plant in 1961 following the strike settlement agreement, the management had decided that it had been "too liberal" in proposing the maintenance of membership provisions, and that the relevant proposal should be withdrawn to "reduce this authority of the Local over the employees."

As regards the incidents, Mr. Becker gave testimony to the effect that soon after he had submitted the Company's proposal of July 27, 1961 to the Union, he had received reports from the plant management that after the end of the 1961 strike, "needles" 2½ inches in length had been placed on an office chair (usually used by the then plant manager, Harold Dillard, according to a letter from the Company reporting the incident to the police) and had caused the refinery superintendent, Bruce May, "a sharp pain" when he sat on the chair; that "somebody" had thrown "a caustic acid" in the shoes of an employee, damaging them, and another employee "had had tar poured into his boots;" that lockers had been ransacked, and pants left in lockers by non-strikers had been cut; and that acid had been placed on, and had eroded, "a rope to a bosun chair" used for painting operations at a height, creating a danger of fatal injury to a person using the chair with the rope in that condition. According to Mr. Becker's testimony, he received such reports in July and September 1961, over a year before he submitted the "open shop" proposal.

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[7] (Continued)

other injured employees, and that it was the Company's responsibility, and not the Union's, to seek reimbursement from the employee in question.

There is no evidence that the Union or any of its members was responsible for any of the incidents, nor, for that matter, does the record identify any person responsible. A letter dated August 10, 1961 from the Company to the Signal Hill police reporting the needles incidents refers to "a history of hard feelings by some of the employees towards Mr. Harold Dillard," and makes no reference to any of these unidentified employees in the context of any strike or union activity or connection.

At some unspecified point in 1962, the Union and the Company agreed to defer wage discussions until after the conclusion of negotiations in the oil industry then in progress and the establishment of "the industry pattern" of wages. It does not appear whether the proposed wage increases of about 6% embodied in the Union's contract offer of September 19, 1962, were discussed during the remainder of that year, but, in any case, at the fourteenth meeting, held on January 2, 1963, the Company made a proposal to increase the wages of the unit employees by 5% or, in the alternative, to establish a pension plan, a copy of which was given to the Union, and to deduct the cost of the plan from the increases, applying any balance remaining to wages.

The upshot of the matter was that the Union, following approval by the employees, agreed to accept the 5% increase in the form of wages, and an accord to that effect was set forth in a letter from the Company, which was "(a)greed to and accepted" by the International on February 3, 1963. The agreed terms also provided that "wages and pensions shall not be a matter of negotiation until such future time as the (International) shall open industry-wide negotiations on wages, hours, working conditions, etc. with the oil industry after settlement of its present negotiations with the oil industry."[8]

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[8] Although the letter indicates that oil industry negotiations were still in progress at the time of the wage agreement, one may reasonably

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There were five more meetings in 1963, following that of January 2, but although there was discussion, during their course, of the matters in dispute, reflected, basically, in the departures (apart from wages) of the Company's proposal of October 18, 1962 from the 1960 contract, no agreement was reached at such meetings on any of the subjects in controversy.

At the last meeting in 1963, held on December 13, Mr. Cody asked Mr. Becker whether he was prepared to submit "a final proposal," and the latter replied that he was not ready to do so at that point and would require some time to prepare one, and that he would communicate with the Union "right after Christmas" to arrange a meeting.[9]

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[8] (Continued)

infer, against the background of the arrangement in 1962 between the Union and the Company for deferral of wage negotiations, that by the date the Company made its 5% proposal, a wage pattern, at least, had emerged from the industry negotiations.

[9] Findings above regarding the meeting of December 13, 1963 are based on Mr. Cody's relevant testimony which I credit. According to Mr. Becker and Mr. Willoughby, who attended the meeting, the Company made its "final proposal" at the meeting, the sense of their testimony being that it consisted of the Company's written proposal of October 18, 1962, with whatever changes had been made since. (No changes worth noting had, in fact, been made apart from the agreement on wages early in 1963.) But they, too, in effect quote Mr. Becker as promising future submission of a written "final proposal," and this lends support to Mr. Cody's testimony that Mr. Becker said that he was not yet ready to make such a proposal. Obviously, if Mr. Becker, as both he and Mr. Willoughby claim in effect, said that the contract draft of October 18, 1962 (apart from its wage schedule) was the Company's "final proposal," there would be little reason for Mr. Becker to promise to reduce the Company's "final proposal" to writing, nor does any credible reason appear why Mr. Becker, if he made the "final proposal" he describes, should tell the Union's negotiators, as he also claims, that the preparation of the "final proposal" would "take a long time to reduce . . . to writing."

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Mr. Becker did not communicate with the Union as promised, nor was a meeting held for almost five months, but on or about February 27, 1964, the Company sent employees in the bargaining unit, without prior clearance or arrangement with the Union, copies of a letter, bearing that date, from the Company's vice-president, Earle Willoughby (who attended most of the negotiating meetings), to Mr. Cody, stating in substance, that in furtherance of a policy of improving "its employee program," the Company was granting "all MacMillan employees" with 20 or more years of service four weeks of paid vacation; that unless the management heard to the contrary, it would assume that the change in benefits met with Mr. Cody's approval; that if he did not wish the benefit to be granted, he should advise the management, which was willing to discuss the matter; and that by "copy of this letter, we are informing all the MacMillan employees of this new vacation benefit."

Mr. Cody telephoned Mr. Willoughby upon receipt of the letter on February 28, 1964, and told him that the matter

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[9] (Continued)
Mr. Becker, to be sure, submitted a contract proposal at a meeting on September 2, 1964, but that proposal, putting aside the subject of wage rates which were not an issue in December 1963, and the added vacation benefit which was no longer in issue in September 1964, and with the exception of relatively minor language changes in the subcontracting article, is in all material respects identical with the contract proposal of October 18, 1962. Why a virtual replay of that proposal "would take a long time to reduce . . . to writing" does not plausibly appear. Moreover, Mr. Willoughby's account does not quote Mr. Becker as saying that preparation of "a final proposal" would "take a long time;" nor does either deny, in terms at least, that Mr. Becker promised to communicate with the Union "right after Christmas" regarding another meeting. The fact is that the next meeting was held on May 7, 1964, some five months later, and then only after prodding by the Union; and Mr. Becker's unsupported claim that he said his final offer would take "a long time" to prepare will not credibly suffice to explain the lapse of time between the two meetings.

would be submitted to a meeting of employees, and that a "signed letter of agreement" would be necessary. The Company prepared such a letter on March 2, 1964, and its terms became an agreement upon execution by the International on the following day.

In February 1964, at a meeting of employees in the unit, all but one of those present voted in favor of a strike against the Company in support of the Union's contract demands, and to authorize the negotiating committee to determine the date of the strike.

On March 18, 1964, Mr. Cody, not having heard from Mr. Becker regarding a meeting, wrote a letter to Mr. Willoughby, proposing that the parties enter into an agreement incorporating the terms of the 1960 contract and the additional vacation benefit; requesting the negotiation of a pension plan, an outline of which was enclosed; and that Mr. Willoughby communicate with Mr. Cody regarding arrangements for the resumption of negotiations. Mr. Willoughby replied by letter dated March 30, 1964, stating that the Company was endeavoring to secure information regarding the pension plan material submitted, and would communicate with Mr. Cody to arrange for a meeting; and that in the future, matters pertaining to negotiations be taken up with Mr. Becker.

By the latter part of April 1964, the Company still had not communicated with the Union to arrange a meeting, and Mr. Cody called Mr. Becker and requested one, with the result that the parties agreed to meet on May 7, 1964.

The meeting was held as agreed and appears to have been devoted primarily to discussion of the Union's proposal for a pension plan. The Union described the International's current oil industry "bargaining policy" which sought an increase in economic benefits amounting to 5% of wages, and informed the Company that the represented employees wished to use the 5% for the purchase of a pension plan. A representative of the Local, Robert Brown, who had had some experience with the plan, which had previously been sent to the Company, gave a detailed explanation of the program, and Mr.

Becker asked for a printed copy of the plan (as distinguished from the outline), was told that it had not yet been printed, and requested that a copy be sent him when put in print. (None had been received as of the time of the hearing. It does not appear whether a printed copy ever became available.) The Company said it would take the plan under consideration.[10]

The record reflects some conflict on the subject of arrangements for a subsequent meeting. I do not believe that total truth in this area resides with either side.

According to Messrs. Willoughby and Becker, Mr. Cody agreed to defer negotiations until after a settlement in industry-wide negotiations (apparently then in progress or imminent). Mr. Cody states that he cannot recall such an arrangement, and the sense of his testimony as to the way the subject of a future meeting was left, is that Mr. Becker promised to call him to arrange one. Objective features of the record support Mr. Willoughby and Mr. Becker. One is that the parties had a somewhat similar deferral arrangement in 1962. Another is that the Union was already obligated by the wage agreement made early in 1963 to defer wage and pension negotiations "until such future time as the (International) shall open industry-wide negotiations. . .," and, while this is not a commitment to defer negotiations on all subjects, it enhances the plausibility of the claim that the deferral arrangement in question was made. I find that there was such an arrangement.

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[10] Mr. Cody testified that he could not recall the request for the printed copy. Mr. Brown, to whom the request was addressed, did not testify. I think it quite plausible that such a request would be made, and have thus made the relevant finding above, but I do not credit a claim by Mr. Becker that he repeated the request to Mr. Brown at subsequent meetings. The latter did not attend any meeting after that of May 7, 1964, as is evident from G.C. Exh. 3(b). Moreover, Mr. Willoughby in effect contradicts Mr. Becker, testifying that the request was not renewed at any subsequent meeting.

On the other hand, I am unpersuaded that it was Mr. Becker, as he claims in effect, rather than Mr. Cody, as the latter claims, who first broached the subject of a resumption of negotiations after the May 7 meeting. Mr. Becker gave testimony to the effect that he called Mr. Cody early in August, and inquired whether an agreement by a large oil company to increase economic benefits by 4½% of wages was the "industry pattern;" that after Mr. Cody expressed uncertainty, they agreed to await "a definitive pattern;" that Mr. Cody called him later in August, said, "It looks like 4½ per cent," and inquired about a meeting; that they set one for August 20; that he (Mr. Becker) telephoned later to request a postponement, suggesting September 2, because the Company had not yet received some pension material (which, according to Mr. Willoughby, MacMillan had requested from a company specializing in such matters); that he inquired about the "industry pattern," was told that it appeared to be "4½ per cent," and said the Company "will meet the industry pattern;" that Mr. Cody replied, "That is all we are asking for;" and that September 2 was agreed upon as the next meeting date.

Mr. Cody testified that he initiated the telephone conversation early in August by calling Mr. Becker, and that substantially what occurred on that occasion was that he asked for a meeting and that they set one for August 20 (erroneously stated to be August 25 in the transcript). In addition, Mr. Cody denied that he made any reference to any industry settlement in this conversation, but stated that during the conversation in which Mr. Becker requested the postponement, he told Mr. Becker that "the pattern had not been set as yet, that there had been one or two offers (in the industry negotiations) and that he (Mr. Cody) was quite busy in negotiations with other companies."[11]

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[11] A claim in the Respondent's brief that one of the reasons for the postponement given by Mr. Cody in his testimony was that the "pattern" had not yet been established is inaccurate. Mr. Cody did testify that he told Mr. Becker that "the pattern had not been set as yet,"

Much of the detail of the August conversations appears to me to be of no large moment, since the only matter of any substance in issue is whether Mr. Cody or Mr. Becker initiated the first call in August, and there is no reason to believe that the Company was unwilling to meet the "industry pattern" to the extent of the relevant percentage increase in economic benefits, but for the bearing it has on the matter in issue, I note my view that a vein of self-serving exaggeration appears in Mr. Becker's testimony in this area as in others to be described later. It does not seem quite plausible to me that with the wide gulf that separated the parties on so many issues for so long, a man with the long experience in contract negotiations that Mr. Cody has had (over 17 years as a representative of the International), with the characteristic of reserve and cool judgment that he displayed in the more than two hearing days he spent on the witness stand, would baldly tell Mr. Becker "That is all we are asking for" when told by Mr. Becker, according to the latter's account, that the Company would meet the "industry pattern" of an increase of 4½% in economic benefits. The Union was seeking much more, including a "contributory" pension plan to which the Company had not (and has not) agreed. The imputation of such a remark to Mr. Cody, in the circumstances presented, strikes me as of a piece with an implausible claim by Mr. Becker, unsupported by Mr. Willoughby, that at the December 13, 1963 meeting Mr. Becker said that the "final proposal" the Union requested there "would take a long time to reduce .... to writing," a claim

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[11] (Continued)
but it is reasonable to put this statement in the context of an inquiry by Mr. Becker about the "pattern" – a query that the latter imputes to himself in his account. The fact is that Mr. Becker himself states that he asked for the postponement because he was not ready with the pension material, and that Mr. Cody quotes Mr. Becker, in a not significantly different vein, that the Company "wasn't ready to make a proposal on wages."

advanced, in my view, *post hoc, ergo propter hoc* to justify the lapse of about 9 months before the submission of such a "final proposal" (which varies little from the Company's contract proposal of October 18, 1962); and with Mr. Becker's testimony, contradicted by Mr. Willoughby, that at meetings after that of May 7, 1964, Mr. Becker asked Mr. Brown for a copy of the pension plan discussed by the latter, although Mr. Brown did not in fact attend any of the meetings after that date.

Moreover, the image Mr. Becker portrays of himself as initiating discussion of the subject of another meeting with a call to Mr. Cody does not quite fit the picture of foot-dragging by the Company with respect to the resumption of negotiations after the meeting of December 13, 1963, drawn by the evidence of Mr. Becker's failure to call Mr. Cody "right after Christmas" in 1963 to arrange a meeting, as he had promised; the lapse of time between the December 13 meeting and that of May 7, 1964; the initiatives taken by the Union to secure a resumption of negotiations after the December 13 meeting; and the Company's failure to communicate with the Union regarding a meeting to that end, as promised in the Company's letter of March 30, 1964 in reply to the Union's letter requesting such resumption. I find, in short, that Mr. Cody took the initiative, by calling Mr. Becker early in August, in seeking the resumption of negotiations that followed the meeting of May 7, 1964.

The point at which a "pattern" of economic benefits emerged from negotiations on a national level in the oil industry in 1964 is unclear, but there is no dispute that by September 2, 1964, the date fixed by Messrs. Cody and Becker for a meeting, such negotiations had resulted in agreement between the International and various companies to increase economic benefits of employees by an amount equal to 4½% of their wages.

On the morning of September 2, 1964, shortly before the scheduled meeting which was to be the twenty-first in the contract negotiations, the Union's negotiating representatives

discussed the question of calling a strike, and following remarks by Mr. Cody to the effect that the Union had been expecting, but had not received, the contract proposal Mr. Becker had promised at the meeting of December 13, 1963, and that matters ought to be brought "to a head," the employees' committee decided on a strike at the Signal Hill facility, to begin on September 8, 1964, if no adequate progress was made in negotiations.

There is no dispute that shortly after the meeting opened Mr. Becker made an economic offer which, in ultimate amount, would follow "the industry pattern," but there is division in the record whether the offer was solely that the 4½% increase be applied to a pension plan, as Mr. Cody and other representatives of the Union at the meeting state, or whether, as Messrs. Willoughby and Becker say, the Union was given a choice between a 4½% wage increase and a pension plan. That issue will be discussed at a separate point below.

Mr. Becker told the Union's representatives that the pension plan he was proposing was in effect at MacMillan's Arkansas plant, and he gave Mr. Cody a printed copy of the plan, also explaining various of its details. Mr. Cody inquired whether the plan was the same as that turned down by the Union early in 1963 when the Union accepted the alternative of a 5% wage increase, and Mr. Becker replied that such was the case. There was some discussion of the Union's pension proposal that had been made at the prior meeting, including the fact that unlike the Company's plan, it required contributions from both the employer and the employees (thus, as one may infer, resulting in larger deposits in the pension fund than visualized by the Company's plan), and Mr. Cody said that the Company's proposal was not acceptable.

Mr. Cody then asked Mr. Becker for the "final proposal" the latter had promised at the meeting of December 13, 1963, and Mr. Becker gave him a draft of a contract, which was the same as the Company's contract proposal of October

18, 1962, with a few relatively minor exceptions of no impact on the ultimate results here.[12] After an examination of the draft, Mr. Cody said that it was as bad as, or worse than, the Company's last proposal, and that unless the parties reached an agreement by the morning of September 8, embodying a pension plan and the terms of the 1960 contract (apart from wages and the added vacation benefit, obviously, since such matters had been the subject of agreement since), the Union would take "economic action" against the Company or, in other words, call a strike.[13] At this point, Mr. Becker asked Mr. Cody, "Haven't you had

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[12] In substance, the Company's contract proposal of September 2, 1964 differed from the previous one in its schedule of wages rates (which were those currently in effect as a result of the agreement in 1963); the incorporation of the additional week's vacation for employees of 20 or more years of tenure, a benefit put into effect early in 1964; and a revision of the prior proposal on subcontracting (spelling out the management's unfettered right to subcontract with greater specificity).

[13] There are minor and immaterial variances among the several versions as to the terms in which Cody referred to the "agreement" he demanded. Messrs. Willoughby and Becker quote him as demanding the "old" (1960) contract and a pension plan; Charles Brant, an employees' committee member, as requiring the Union's "proposed contract" and a pension plan; Dale Scharnow, another member, as seeking "a satisfactory agreement" and a pension plan; Robert Hunter, a third member, as demanding "a contributory pension plan and a signed contract." According to Mr. Cody, he required "an agreement" by the specified date. Whether he expressed himself that way or in any of the other ways, I have no doubt that in the context of circumstances, the thrust of his statement, and of the understanding of those present, was that he was demanding an agreement embodying a pension plan and the terms of the 1960 contract, apart from its wage provisions and the added vacation benefit. It may be borne in mind, in that connection, that the Union's proposal of September 19, 1962 is not greatly different from the 1960 contract, and that during the strike, it made comparable proposals.

enough yet?" or words to that effect. Mr. Cody requested that negotiations continue that day, but Mr. Becker declined, stating that he had to make arrangements for the continued operation of the plant.

The question whether the Union was given a choice between a wage increase and a pension plan has relevance to an issue whether the Company, by a letter to unit employees, dated September 3, 1964, and copies of an announcement issued on November 4, 1964, and sent to employees about that date, misrepresented the conduct of the Union's negotiating representatives at the meeting of September 2, 1964. Each communication pictures the Company as making the alternative offer at the September 2 meeting, and the Union as rejecting it. The announcement of November 4 also quotes Robert Hunter, a member of the employees' committee, as admitting at the meeting of September 4, at which a mediator from the Federal Mediation and Conciliation Service was present, that "MacMillan had offered a 4½% increase in wage rates" (as an alternative to a pension plan).

There is no dispute that at the September 4 meeting all the Union's representatives, apart from Mr. Hunter, under interrogation by the mediator, in substance denied that the wage alternative had been proposed at the prior meeting. The point of division is Mr. Hunter's response to the mediator's inquiry, and as to that, Mr. Becker and Mr. Willoughby quote him as making the admission, but the Union's negotiators, in substance, deny that Mr. Hunter made it, the latter testifying that he told the mediator that the Company "did not offer the wage increase but had offered a pension plan for 4½%."

Resolving, first, the issue of the alleged admission, the qualitative weight of the evidence does not, in my view, support Messrs. Becker and Willoughby. Mr. Becker himself testified that Mr. Hunter, at an earlier point in the meeting, responding to a question by Mr. Becker, denied that the wage proposal had been made, and it does not plausibly appear why Mr. Hunter would change course in a reply to the mediator's inquiry, especially in the setting of unanimity on the

subject by all the other union representatives at the meeting. Moreover, a sworn written statement made by Mr. Becker on December 22, 1964 supports a belief that the admission he imputes to Mr. Hunter is the product of a conclusion he draws from something Mr. Hunter said rather than an accurate reproduction of what was said. In the statement, Mr. Becker said: "Finally, Bob Hunter admitted to Jules Medoff (the mediator) that we had offered them the 4½% wage increase. The way the conversation between Medoff and Hunter went is something like this: Medoff said, 'Now, Mr. Hunter, was this offered?' and Hunter said, 'No', and they kept talking and Medoff said, 'Are you going to tell me that there was not any presentation, not even a 4½ percent talked about?' Hunter said, 'Yes it was.' Hunter said there was an offer of 4½ percent." The point of the matter is the offer of a "wage increase" that Mr. Becker claims Mr. Hunter "(f)inally . . . admitted" had been made is not in terms reflected in the colloquy between Mr. Medoff and Mr. Hunter as Mr. Becker himself describes it. It is not disputed that the Company had made "an offer of 4½ percent" at the September 2 meeting, the conflict being whether it was a pension offer or the alternatives claimed by the Company, and, plainly, "something like" a statement by Mr. Hunter that "there was an offer of 4½ percent" is hardly an admission that the Company had "offered them the 4½ percent wage increase." In short, I am unable to accept the claim that Mr. Hunter made the admission in question, and credit the testimony that he did not.[14]

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[14] The General Counsel does not make clear whether he claims that the imputation of the admission to Mr. Hunter was a wilful misrepresentation designed to undercut the Union as part of a pattern of bad faith in bargaining. In any case, Mr. Becker's previous sworn statement suggests at least a strong possibility that he and Mr. Willoughby misunderstood Mr. Hunter, and there is insufficient warrant for a belief that they wilfully misrepresented him. I draw no inference of bad faith from the misstatement.

On the other hand, I am not persuaded that the September 2 offer in question was confined solely to a pension plan, as the Union's representatives claim. It is true that at the preceding meeting (May 7), the Union had informed the Company of its wish to apply any economic increase to a pension plan, but that does not inevitably mean that the Company would so confine its offer. Early in 1963, in the context of a pending proposal by the Union for wage increases harnessed to the outcome of industry-wide negotiations, and an expression of a desire by the Union for a pension plan, the Company had made an alternative proposal much like the one Mr. Becker asserts he made at the meeting of September 2, 1964, and I find nothing implausible in a conclusion that it followed a course at that meeting similar to one it had taken before. The form of the previous proposal is an objective factor that tends to support the Company's position.

Moreover, Mr. Becker, who testified at substantial length, displayed a disposition, as a witness, to speak with discursive rapidity, and while, in the nature of things, we have no precise reproduction of the climate of feeling at that or any other meeting, nor of the exchanges that took place, with the thrusts, parries and conversational minutiae that experience tells us so often attend such meetings, and that witnesses may subsequently forget, disregard or wittingly or unintentionally telescope into preferred conclusions, it is readily conceivable that in one context or another at the September 2 session, Mr. Becker made the 4½% offer in the alternative form the Company claims; that because of the speech characteristics mentioned, the Union's representatives mistakenly understood his offer to be confined to pension contributions; and that, in the setting of the Union negotiators' concentration on the subject of a pension program, the Company's representatives mistook the Union's position on the Company's pension proposal for a rejection of its 4½% economic offer as a whole.

Be that as it may, the burden of proof on the relevant issue is upon the General Counsel, and particularly taking into account the objective fact that the Company had once before made a comparable alternative offer, and the absence of any substantial evidence that the Company had anything to gain by confining its offer of a 4½% increase to a pension plan instead of offering the alternative of a wage increase, it appears to me that the General Counsel has not sustained his position by evidence of preponderant weight. Thus I hold that the record will not sustain a conclusion that the relevant statements in the letter of September 3, 1964 and the announcement of November 4, 1964 so misrepresented to the employees the position of their representatives as to amount either to manifestations of bad faith in bargaining or any abridgement of the rights guaranteed employees by Section 7 of the Act.

In addition to the controversy at the meeting of September 4, 1964 over the nature of the Company's economic offer at the previous meeting, there was some discussion of other subjects in dispute, including check-off and union shop provisions, subcontracting, and management rights, each side caucusing separately with the mediator, but no agreement was reached on any subject in dispute.[15]

As of that point, the divisions between the parties consisted, basically, of the differences between the types of pension plans they had respectively proposed, and between the Union's contract proposal of September 19, 1962, the terms of which, putting aside its wage schedule and a relatively few minor changes, were virtually identical with those of the 1960 contract, and the Company's contract proposal of September 2, 1964, which, as previously indicated, was

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[15] Testimony by Mr. Cody to the effect that the mediator, after caucusing with the Company's representatives, told the Union's negotiators, in their caucus, out of the presence of any agent of the Company, that it "was withdrawing the 4½ percent offer" was stricken; and no findings here are based thereon.

little different from the Company's proposal of October 18, 1962.

On September 6, 1964, at a meeting of 25 of the 31 employees then in the unit, one or the other of the Union's bargaining representatives read their "minutes" of the last three meetings with the Company and portions of the Company's "proposed contract" (submitted at the meeting of September 2, 1964), including the appended list of "rule infractions;" reported the strike warnings that had been given the company; and answered questions "regarding the possible strike and the negotiations." One employee suggested another strike vote because there were two "new employees" who had not participated in such a vote previously, but several others present said that that was not necessary, and that the impending strike was "legal."[16]

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[16] The Respondent stresses the absence of a strike vote on its "last proposal," but the thrust of its position is less than clear. Its willingness to follow the "industry pattern" of a 4½% increase in economic benefits does not alter the fact that its "final proposal" for "a new labor agreement" in the sense of a codification of collective bargaining relations between the Union and the Company was little different from the Company's contract proposal of October 18, 1962; that about nine months had elapsed since Mr. Becker's promise of December 13, 1963 to submit a "final proposal;" that there had been foot-dragging and broken promises by the Company in connection with a meeting after that date; that at various union meetings, a substantial majority of employees present had voted in favor of a strike in support of the Union's contract proposals, committing the date to the discretion of the negotiating committee; and that the committee had decided on a strike on the morning of September 2, 1964 if no adequate progress was made in negotiations. If the Respondent's position is that the strike that began on September 8, 1964 was unlawful for lack of proper authorization, I find no merit in it. There were 17 unit employees at the union meeting held in February 1964, all but one voting in favor of a strike. In addition, there had been an earlier vote at a union meeting on September 10, 1963, when 21 of 23 unit employees present voted for a strike, also committing the timing to the discretion of their negotiating committee. Notwithstanding the

(Continued)

The negotiating session of September 4, 1964 was the last prior to the strike which began at the time specified at the September 2 meeting (and was still in progress at the time of the hearing in this proceeding more than a year later). The meeting was brought to a close by the mediator because of the lack of any progress, and each side expressed willingness to meet again.

On November 4, 1964, Mr. Becker sent the Union a wire requesting a meeting to discuss the matter of putting a 4½% wage increase into effect, and the upshot of the telegram was a meeting held on November 6, 1964, in the presence of a Federal mediator. Mr. Becker said there that the Company wished to put the increase into effect, and Mr. Cody replied, in substance, that the proposal was acceptable provided an agreement could be reached on contract terms in dispute; and that the Union wished to negotiate on the other matters. Mr. Becker declined, stating that what he was seeking at the meeting was agreement on the wage proposal, and that an agenda of other matters should be set up for a future meeting, and that he was willing to discuss them at a later date. There was some additional discussion, apparently of a heated nature, over the question of the form of the Company's economic offer on September 2, but of no real moment here, the end result of the meeting being that the parties remained as far apart as ever.

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[16] (Continued)
reference at the union meeting of September 6, 1964 to two "new employees," there is no evidence (nor any claim for that matter) that the total number of employees in the unit at the time of either strike vote exceeded 31, the number in the unit at the time of the September 6 union meeting and of the beginning of the strike, and one may reasonably infer that the total number of unit employees at the time of each vote did not exceed 31. Without implying any view that either strike vote was an essential prerequisite of the Union's right to call a strike, I find that at the time of each vote, a majority of the employees then in the unit authorized the 1964 strike.

The negotiators met again on December 4, 1964 in accordance with an arrangement made by an attorney for the Union and a district official of the International, James Morgan, with Mr. Becker at a meeting that had been held on November 24, 1964, upon the attorney's initiative (but not attended by Mr. Cody and the employees' committee). Mr. Morgan had agreed in the November 24 discussion to send to Mr. Becker, and had subsequently sent him, "a list of the items . . . in dispute."[17]

At the December 4 meeting, the parties canvassed the list of disputed items (17 in number), but made no progress toward agreement on any of them, and, in fact, the division, if anything, deepened as a result of the only change of position at the meeting, consisting of a new proposal by Mr. Becker to add a paragraph to the strike prohibition and related requirements set forth in his contract proposals of October 18, 1962 and September 2, 1964. The added language follows:

> The Union agrees that any time a strike, work stoppage, or interruption of work or other concerted activity occurs by the employees covered hereunder during the term of this Agreement or within one (1) year from its termination, the Union shall pay each striking employee eight (8) hours per day and forty (40) hours per week at his then hourly wage rate for all the time he is on strike, including time and one-half (1½) for all hours spent picketing in excess of eight (8) hours per day and forty (40) hours per week

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[17] I make no additional reference to the November 24 discussion, nor to a previous meeting, held on October 8, 1964 between Mr. Morgan and the Company's representatives, as the discussions on these occasions do not affect the end results in this proceeding. The references I make, at various points, to the number of negotiating meetings do not include these two meetings as they were not attended by the Union's regular negotiating representatives, but it matters not whether one includes them.

with double (2) time for Sunday and holiday picketing.

In submitting the addition, Mr. Becker expressed the hope that the proposal "would prevent future strikes", engaging then in what he terms a "philosophical discussion" about the prevention of strikes, which need not be set forth here. Mr. Cody rejected the proposal, stating that he knew of no union in the United States that would agree to it.

Toward the end of the meeting, Mr. Cody expressed the Union's willingness to meet the following day or any other day or night in an effort to reach a settlement, but Mr. Becker said that he would be away on a business trip until December 18, and could not meet again until after the coming holiday period, and that he would call Mr. Cody upon his return to arrange a meeting.

According to Mr. Becker, he called Mr. Cody upon his return and at that time arranged the next meeting, which was held on January 12, 1965. The meeting did not come about that way, but, rather, it was Mr. Cody, as the latter claims in effect, who took the initiative in seeking the meeting that followed that of December 4. Mr. Cody's claim is amply corroborated by a letter dated January 6, 1965, he wrote to Mr. Becker, requesting a meeting, and a reply from the latter dated January 8, 1965, expressing willingness to meet on January 12, 1965.

There was no change of position at the meeting of January 12, 1965, which was attended by a Federal mediator, nor at the two meetings following, held on January 21 and 28, the parties basically reiterating views and proposals previously advanced.

At a meeting held on March 1, 1965, with a Federal mediator in attendance (as at the next two meetings), the Union submitted a new draft of a contract proposal, offering to agree to such terms or, in the alternative, to "our old proposal of October" (meaning, as I infer from the general context, the Union's proposal of September 19, 1962), as

amended by "letter agreement" (an allusion, apparently, to the vacation benefit added in 1964), together with a 4½% wage increase.

The new draft incorporated most of the terms of the Union's contract proposal of September 18, 1962, differing from the latter, basically, in that it omitted the wage "reopener" provisions, providing, as a substitute, a three-year term with step increases for each employee totalling 22 cents an hour; provided for a pension fund contribution by the Company of 15 cents per working hour for each employee affected (the contributions to be deducted, according to the sense of an explanation Mr. Cody gave Mr. Becker, although not specified in the contract, from the employees' increased wages); set forth a two-step grievance and arbitration procedure patterned after a contract between MacMillan and the "Teamsters;" and provided an upward revision of paid vacation benefits for all categories previously entitled thereto, including five weeks for employees with over 20 years of service (in conformity, Mr. Cody told Mr. Becker, with new contract provisions to which all other Pacific Coast oil companies had agreed).

Mr. Becker said that he would take the new draft proposal under consideration.

At the next meeting, March 18, 1965, Mr. Becker informed the Union that the Company had reviewed the last contract proposal and had found it to be substantially the same as "the old contract," except for "a very few changes . . . previously agreed to in negotiations" and "certain monetary changes;" and that the proposal would increase "economic costs" for the Company. The parties discussed all the articles of the proposal, and the end result, dispensing with a review here of the considerable minutiae in the record, was that the Company would not agree to the new terms submitted by the Union, and that there was no accord on any subject, of any substance at least, previously in dispute, except that the Union abandoned its proposal that employees be allowed to accumulate 60 days of sick

leave, and agreed to the 45-day provision previously in effect.

The thirtieth and final meeting was held on April 2, 1965, upon arrangements by the mediator. The parties appear to have spent most of the time in separate caucuses, with the mediator, going from one to the other. I see no useful purpose in canvassing a discursive description in the record of what was said, for the end result was that no accord was reached on any of the matters in dispute as of the prior meeting, most of which had been in dispute for almost four years before that. The parties recessed subject to call by either side, but so far as appears, there has been none.

The Respondent adduced evidence of alleged acts of misconduct by various individuals during the strike. Much of this consists of reports, mainly by non-striking employees made to, and kept by, the Company during the strike, and is obviously hearsay. Much of it deals with alleged incidents after the last bargaining session, a circumstance that of itself, apart from any other, poses a question of materiality, to say the least, since there is no evidence that they had any connection with the fact that the parties have had no meetings since April 2, 1965. And, plainly, all the evidence of alleged misconduct during the strike is immaterial to the issue whether the Respondent brought bad faith to the bargaining table prior to the strike and thereby caused it, matters that will be determined later, in the light of various aspects of the record not yet mentioned.

The reasons offered by the Respondent at the hearing for presenting the evidence were, basically: (1) that it serves to explain the Respondent's bargaining positions since the strike began, and (2) that the alleged misconduct suspended the Respondent's bargaining obligation. Apart from the hearsay nature of the reports, the attribution of various acts of misconduct to unidentified persons, with the attendant difficulty, if not impossibility, for any adversary party to verify or test the credibility of the Company's relevant testimony, the absence of substantial evidence that some of the

incidents had any connection with the strike, the lack of any evidentiary basis for attributing any responsibility for any misconduct away from the picketed area to the Union or any of its responsible representatives,[17] the evidence in question, which was offered prior to Mr. Becker's testimony, was received with misgiving because all of it would plainly be immaterial if it turned out, after all the evidence pertaining to the negotiations was in, that the Company's attitude toward its bargaining obligation was not materially different after the current strike began from what it had been before, and that its bargaining duty has not been suspended.

The evidence includes testimony describing close-formation picketing at plant gates making it difficult and uncomfortable

[17] Robert Hunter is the only person holding a position with the Union to whom any personal misconduct is imputed. An employee named Howard Elliott, who entered the Company's employ during the strike, testified that in October or November 1964, Mr. Hunter threw a stone onto the Company's property, and hit some pipes; and that Mr. Hunter and another striker, Elgin Bennett, blocked the sidewalk passage of three non-strikers, including Mr. Carter, near a plant exit, Mr. Bennett, according to Mr. Carter, elbowing one of the non-strikers. Mr. Hunter denied the rock-throwing, and Mr. Bennett, supported by Mr. Hunter, gave testimony to the effect that he and one of the three non-strikers "collided," and that that individual "put his hand on my shoulder and shoved me backward." The incident was among the bases for a contempt proceeding (to which later reference will be made) in which both Mr. Hunter and Mr. Bennett were acquitted, and I credit their versions of what took place. Similarly, I credit Mr. Hunter's denial that he threw a stone, noting, in that regard, that he was not charged with that behavior in the subsequent contempt action, although the relevant injunctive order specifically restrains such conduct; and that an affidavit made by Mr. Carter in the contempt proceeding says nothing about rock-throwing. I note, in passing, that various other allegations of misconduct by identified individuals are disputed, but I see no useful purpose in resolving such conflicts since the truth or falsity of the allegations is not, in my view, the question raised by the claimed incidents but, rather, whether they affected the Respondent's bargaining obligation and attitude, as it claims.

for non-striking employees to enter or leave the plant; and that pickets, while engaged in picketing or stationed in the plant vicinity, kicked, pushed, elbowed, stepped on, shoved, and threatened non-strikers, and made vulgar and obscene remarks to them; that various individuals, some identified as pickets, others unidentified, threw stones from the street over the Company's fence onto its property, such stones landing near non-striking employees and one hitting such an employee; that two unidentified persons, driving in a car identified as belonging to a picket, followed a scooter driven by a non-striker at a distance of "about six or twelve inches" at a speed of some 25 or 30 miles an hour, forcing him, because of his fear of collision, to go through a red light; that two individuals identified as pickets "followed" a non-striker by car for some miles while the latter was driving home from work late at night; that pickets were observed tampering with gate locks at the plant premises; and that "staples" (not further elaborated) were "shot" by some unidentified person and landed in the plant premises.

Toward the end of October 1964, about six weeks after the strike began, the Company brought an action in the Los Angeles County Superior Court against the International, the Local, and various individuals, including Cody and the three members of the employees' negotiating committee, seeking, among other relief, an injunction against alleged misconduct specified in the complaint. The Court entered an order to show cause, with companion temporary restraints against the alleged misconduct. Without making any findings, and upon the basis of a stipulation between counsel for the Company and attorneys for the defendants in the action, the Court, on December 1, 1964, entered an order enjoining the defendants from the acts of misconduct alleged in the complaint.

On March 9, 1965, in a contempt proceeding against 16 individuals for violation of the injunction, involving, in the main, various allegations of misconduct summarized above, 12 were found "not guilty" and four, none holding any

office or position with the Union, were "adjudged in contempt," the Court finding that the four men "used vile, threatening and abusive language, shoving, kicking, tripping, and coming into contact with plaintiff's employees not on strike, and of tampering with or touching or coming into contact with plaintiff's pipeline valves or other equipment of plaintiff's refinery operations." The four were fined $50 each.

The wife of an employee, Walter Warner, who returned to work during the strike, gave testimony to the effect that in November 1964, after he had done so, she received an anonymous telephone call from an individual who made an obscene reference to her relationship to "a scab;" that she received "numerous" calls of a similar character during the year thereafter; that on the night of November 15, 1964, she saw two men in a car on the street near her home over a period of more than four hours; that one of the men "climbed upon (a) fence" near the house; that she did not know either man; that on the following night, "a Molotov cocktail" was thrown through a window at her home, "narrowly missing" her two children, setting the bed of one afire, and causing "approximately $1500 damage" in the home; that she reported the incident to police authorities, the fire department and the Company; that at a picnic on July 4, 1965, some seven months later, her 12-year-old son referred to a man who was present with his family as "the man that was on the fence;" and that the man to whom the boy referred is one Lonnie Grady, who had been on strike and whom her husband knew; and that she reported this incident to the police.

According to Walter Warner, "on the night of November 15" (the night before the "Molotov cocktail" incident), as he, one Phil Smock (identified in the record as plant superintendent in 1962, and, presumably, in a supervisory position at the time in question), and another person (apparently an employee) were coming through the picket line, Mr. Hunter said, "I hope you sleep well tonight, Walt." I think

it far more reasonable to construe this remark, if made, as a critical reference to Mr. Warner's abandonment of the strike than as a veiled prediction of the "Molotov cocktail" incident, which did not occur "tonight," but be that as it may, Mr. Hunter denies making the remark, stating that the only time, while on the picket line, that he spoke to Mr. Warner was early in December 1964, and that what he did then was to ask Mr. Warner to pay $40 he owed some strikers. Mr. Warner's claim does not stand up well under examination. Neither Mr. Smock nor Mr. Warner's other companion was called to corroborate him, and, more to the point, a written statement, dated November 16, 1964, the day after Mr. Hunter is alleged to have made the remark, prepared by Mr. Warner for the Company, makes no reference to the alleged remark.[18] I credit Mr. Hunter's denial.

The conduct Mrs. Warner describes is outrageous, but the fact is that there is no credible basis in the evidence for imputing any of it to the Union or any of its representatives, and it would be nothing but thin suspicion to attribute any of the conduct to any other person identified in the record, whether Mr. Grady or anybody else, and no more than a guess even to say that the disordered person or persons responsible for the "Molotov cocktail" throwing knew about the strike.

Evidence of two other incidents should be mentioned before proceeding with conclusions on the bargaining issues. These were related by an employee named Joseph Hill who participated in the strike, engaging in picketing, and returned to work in June 1965, about nine months after the strike began. Mr. Hill, it may be noted for future reference, was reemployed by the Company, although he is repeatedly named as a malefactor in the reports made to the Company during the strike. Among the acts of misconduct attributed to him there are throwing rocks at refinery tanks, tripping an employee, throwing an iron bolt at a plant guard, calling him obscene names, threatening to shoot the guard, calling

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[18] See R. Exh. 7(b).

employees vulgar and obscene names, threatening employees, and doing so while under the influence of liquor. Mr. Hunter, who was a picket captain testified, without contradiction, that Mr. Hill reported to the picket line while intoxicated, and was removed from picket duty for that reason.

Be that as it may, according to Mr. Hill, several months after he returned to work, while he was proceeding in his car close to the plant, an unidentified person "fired a pistol at my automobile, hitting the left window at my head," and shattering the glass, but if the incident occurred, it is evident that he is guessing as to the cause of the broken window, for he neither saw the "pistol," which he later termed a "pellet gun," nor heard the sound of a shot, nor found a bullet or a pellet. Also, he conceded that the individual he suspected as having "fired" the "pistol" or "pellet gun" was not a picket, but "a relative to one of the pickets." (His report of the incident to the Company, however, names a striker, James Long, who engaged in picketing, as the suspect.) According to Mr. Hill, also, one morning he found that three tires of his car, while parked in front of his home, had been punctured, and that its air conditioning and power brake hoses, and its fan belt, had been cut. He claims he informed the refinery superintendent, Bruce May, of the incident. Presumably, if he did so, the report was oral, for there is no reference to it in the written reports in evidence.

Since Mr. Hill identifies no individual as responsible, it is, in the nature of things, a practical impossibility, short of calling every striker and representative of the Union connected with the strike, for the General Counsel or the Union to refute the implication that either alleged incident arose out of the strike or that the Union or anyone connected with it or the strike had any responsibility in the premises. In any event, Mr. Hill's credibility is beside the point, for whatever view one takes of it, or whether or not one believes or suspects that the incidents he describes

arose out of the strike, the question is whether the written report he made, and the other one he states he submitted, as in the case of all the other reports in evidence, whether or not the incidents they describe were the subject of testimony, have any material impact on the Company's bargaining attitude or duty, a matter that will be determined later.[19]

C. Conclusions on the bargaining issues and the cause of the strike

As a preliminary matter, I disagree with a contention by the Respondent that it was not obligated to bargain with the Union because the letter instruments of February 2, 1963 (providing for a wage increase) and March 3, 1964 (by which the International acceded to the additional vacation benefit) were of indeterminate duration, and the Union has never complied with the notice requirements of Section 8(d) of the Act, which, in relevant part, provides:

> That where there is in effect a collective-bargaining contract . . ., the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification –
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> (1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration

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[19] I dispense with a summary of the hearsay reports in addition to references already made to some, since they add nothing of substance to the testimony recounting alleged acts of misconduct. Some of the material in the reports was the subject of testimony, while all or almost all of the remaining reports contain descriptions of picket line incidents much like those depicted in testimony.

> date, sixty days prior to the time it is proposed to make such termination or modification;
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> * * *
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> (3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes. . . .[20]
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> * * *
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> . . . the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms or conditions contained in the contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract.

It is unnecessary to decide, and I intimate no view, as to any circumstances in which either of the letter instruments could be regarded as contracts within the reach of Section 8(d), nor, if one takes them to be thus subject, to explore the effect of the provision relieving parties, in prescribed circumstances, of the duty to discuss modifications of a "contract for a fixed period," for the Respondent's contention suffers from the central fallacy that it shears off the fact that the Company bound itself by the "strike settlement agreement" of June 13, 1961, which "mutually terminated" the 1960 contract, to embark upon negotiations for "a new labor agreement." It would be an absurdity to say that what the parties visualized by "a new labor agreement" was but a relatively small fraction of the subjects covered by the 1960 contract; and it is plain that the thrust of the parties' commitment was the negotiation of "a

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[20] As stipulated at the hearing, the Union has not given the notices to the Federal and State conciliation services prescribed in Section 8(d)(3).

generalized code to govern"[21] their collective bargaining relations as a replacement for the 1960 contract. In other words, whether or not one assumes that the Union had an obligation to comply with the notice requirements regarding termination or modification of the wage and vacation arrangements, it obviously had none with regard to all the other mandatory subjects of bargaining encompassed in the Company's commitment to negotiate regarding "a new labor agreement," and the Union's omission to comply with the notice requirements does not immunize the Company from its statutory obligation to negotiate in good faith on such subjects.

It is a pervasive fact in this case that the negotiations spanned almost four years and that the parties met some 30 times without achieving the "new labor agreement" they had committed themselves to seek and, as is evident, the central inquiry here must be why they reached such a fruitless end. Unlike the Respondent in its brief, I am unable to find compelling indicia of the good faith it attributes to itself in the fact that it submitted three full contract proposals; discussed them, as well as those of the Union, at numerous meetings; agreed to a wage increase early in 1963, and an added vacation benefit the following year; and made the 4½% offer of September 2, 1964.

The Respondent's contract proposals and the numerous meetings may be a badge of bad faith, rather than good, depending upon its aim. A single meeting to which the parties bring an honest purpose to reach agreement is something of value; 30 meetings without such an aim are dross; and marathon discussions are, unhappily, a familiar device to frustrate the bargaining process, as attested by the many cases involving the tactic that have come before the Board over the years. Nor is the incorporation, substantially intact, of 14 of the articles of the 1960 contract in the Company's contract proposal of July 27, 1961, as well as in the

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[21] *United Steelworkers of America v. Warrior & Gulf Co.*, 363 U.S. 575, 578.

two that followed, the badge of good faith that the Respondent would make it out to be. Two of the articles (I, "Recognition;" and XVIII, "Military Service") are substantially merely restatements of obligations imposed upon the Respondent by law; there is good reason to believe that the benefits covered by three others (XVII, "Sick Leave;" XIX "Jury Duty;" and XX, "Death in the Immediate Family") are provided by the Company for all employees, with or without a union contract;[22] and the remaining nine articles either dealt with subjects of little or no importance (XXII, "Validity;" XVII "Physical Examinations" and XXVIII, "Notices"), or provided working conditions widely in effect in industry, with or without a union contract (V, "Hours of Work;" VII, "Holidays;" XXI, "Clothing Allowance;" and VIII, "Vacations"), or secured the continuation of existing wage and other economic benefits (XXIV, "Maintenance of Existing Benefits;" and X, "Wage Rates and Classification Changes"), or possessed some or all of these characteristics in combination. In short, a test of the good faith of the Respondent's contract proposals is not to be found in the incorporation of these types of provisions but in the Respondent's underlying purpose in proposing, and insisting upon, substantial departures from the 1960 contract in areas of vital impact upon the relationship between the employees' bargaining representative and the Company – a matter that will be considered at a later point.

The Respondent's agreement to a 5% wage increase early in 1963, and its offer the following year of a 4½% increase, payable as wages or pension contributions, are similarly, in the light of the total record, not impressive as an earnest of

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[22] A contract between the Company and the "Teamsters" provides that all employees it covers "shall continue to participate in all benefits *heretofore* available to the employees, insofar as said benefits refer to the following subjects: sick leave, jury duty and death in the immediate family" (emphasis supplied). See Article XIV, on page 9, G.C. Exh. 3 (bb). Moreover, the "Jury Duty" and "Death in the Immediate Family" articles, at least, provide working conditions widely found in industry, with or without union contracts.

good faith bargaining for "a new labor agreement." Signal Hill, California, as is commonly known, and as I judicially notice here, is, in an important petroleum producing area that provides employment for a considerable number of persons, and common sense tells us that the Respondent would be under some necessity to follow industry wage patterns to attract or retain labor in competition with other producers in the area. Indeed, there are clear indications that the Respondent harnessed its wage scales to industry bargaining patterns, agreeing with the Union three times to await the outcome of industry-wide negotiations, once in 1962, preceding the wage increase of February 1963, and twice (in the letter agreement for that increase and at the December 13, 1963 meeting) prior to the 4½% offer the following year. Mr. Becker, in fact, portrays himself as asking Mr. Cody on three occasions in August 1964 for information as to the "industry pattern," and as assuring Mr. Cody in one of the conversations that "we will meet the industry pattern" of 4½%. In other words, one may fairly infer that meeting wage norms established by industry-wide bargaining is a fact of economic life for the Company. It was forbidden by the Act to make any wage changes in pursuit of these standards without consulting with the International as the employees' statutory bargaining representative, and thus I am unable to draw from the 5% wage increase and the 4½% offer any significant conclusions concerning the Respondent's good faith in the much broader context of negotiations for a codification of collective bargaining relations with the Union that "a new labor agreement" would represent.

As for the added vacation benefit, so far from serving as an expression of good faith bargaining by the Company, the circumstances surrounding it point in a reverse direction. The Union, on a number of occasions, beginning with the start of the negotiations in June 1961, had proposed the added benefit, and Mr. Becker had taken the position that the Company could not afford it. Almost three years after the initial proposal, the Company notified employees in the unit that it was putting the vacation benefit into effect.

The notification affords a revealing glimpse of the Company's attitude toward its bargaining responsibility. The announcement, to be sure, took the form of a copy of a letter to Mr. Cody, but, it was mailed to employees on the same day as the letter to Mr. Cody, and, they, like Mr. Cody, were informed of the added benefit, without any prior arrangement or agreement with the Union. What is more, there is not a word in the body of the letter to suggest that the added benefit had been proposed by the Union or that it was the product of any arrangement or agreement with the Union. On the contrary, the announcement states that the Company "is continually striving to improve its employee program," that the benefit was "(i)n furtherance of this policy," and that "all MacMillan emoloyees" with the prescribed years of service would be given the added week's vacation. This would reasonably lead employees represented by the International, even if they had prior knowledge of its vacation proposal, to believe that the benefit was an act of grace by the Company for "all MacMillan employees" in pursuit of its "policy," rather than the product of the International's representation. That view of the matter is fortified, rather than diminished, by the statement in the letter that "should you (Mr. Cody) not wish for MacMillan to grant this new employees' benefit, please advise us," for the reference to the "grant" serves to give additional emphasis to the Company's action as an act of grace. The fact that the added benefit was, upon Mr. Cody's request, subsequently embodied in a letter agreement does not alter the underlying thrust of the "grant" and the manner of its announcement; and what is more, there was little or nothing else that the International could do but agree, for it could hardly veto the "grant" of a benefit that it had been seeking for some years, and obviously, too, a veto would invite the employees' displeasure with their bargaining representative.

The method used by the Company to announce and put the benefit into effect appears to me to be distinguished for its slyness rather than as a manifestation of good faith bargaining; and I am convinced, and find, that the underlying

purpose of the procedure was to project an image of the Company as the benefactor of "all" its employees, without regard to union representation, with a corresponding implication for the employees in the unit that their bargaining representative was ineffective, or, in short, to undermine the International's representative status.

There is far more in the record pointing to such an aim than the method used to grant the vacation benefit, and this becomes apparent upon consideration of various provisions of the Company's contract proposals, and related positions taken by it, in the negotiating meetings.

As matters stood when the present strike began, after more than three years of negotiations, apart from the subject of a pension plan, the gulf between the parties consisted basically of the departures from the 1960 contract embodied in the Company's contract proposal of September 2, 1964, which as previously noted, was not significantly different (omitting wage and vacation benefit changes in the intervening years) from the contract proposal of October 18, 1962. These departures, among other results, would, if agreed to, include a denial of any provision for union security, and incorporation of "management rights," "rule infractions," disciplinary and seniority provisions, which, read together, would vest in the Company practically exclusive control over the employment relation (except for the employee's right to quit), thus, in practical effect, denuding the grievance and arbitration procedures of much of their meaning, if not, in fact, making them an empty shell altogether.[23]

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[23] In its brief, the Respondent construes the "management rights" article in its second and third contract proposals as providing that "disciplinary action must be for cause." It is true that the article states that the "Company specifically reserves the exclusive right in its judgment to reprimand, suspend, discharge or otherwise discipline employees for cause," but it is at least arguable that the quoted clause is an express reservation rather than a limitation, and that the article reserved to the management practically exclusive control over the

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Obviously, as the capacity of a union to give collective bargaining protection to those it represents lies at the heart of its ability to retain its mandate from them, the exclusion of the International from any meaningful participation in government of the employment relation to the extent reflected in the Company's proposals, would be, to say the least, a drastic thrust at the International's representative status; and it is thus of prime importance to examine the reasons the Company gave the Union for the course it took, and the justifications its bargaining spokesman put forward in his testimony. Making such an inquiry, one finds the purported reasons enmeshed in implausibilities and shifting and inconsistent positions.

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[23](Continued)

employment relation, apart from the employee's right to terminate it, in view of the provision that "(e)xcept as explicitly limited by a specific provision of this Agreement, the Company shall continue to have the exclusive right to take any action it deems appropriate in the management of its plants and direction of the work force in accordance with its judgment." In any event, whether or not the "management rights" clause is as limited as the Respondent now claims, I have no doubt that the Company's aim was either to remove discharges and disciplinary actions from the reach of the grievance and arbitration procedures or, at the least, to make these so difficult of application as to make them practically inoperative. Significantly, in that regard, a clause in the grievance and arbitration provisions of its first proposal (July 27, 1961), taken from the 1960 contract, that disciplinary action or discharge "shall be only for just cause," was deleted from the Company's second and third proposals, both of which added a provision that if the Company claimed a matter not to be arbitrable, the issue "shall *first* be decided by a court of law" (emphasis supplied). Obviously, taking into account all the possibilities of delay in legal proceedings, it could take years before the Union could even submit an employee's case to an arbitrator. What is more, even before the deletion of the clause that discharge or other discipline be only "for just cause," Mr. Becker told the Union at the meeting of September 26, 1961, that the exercise of the management's judgment in applying any of the 35 disciplinary rules in the Company's 1961 proposal to discharge or discipline an employee would not be arbitrable.

This is the case with the stated reasons for denying the International any provision for union security. The maintenance of membership clause of the Company's proposal of July 27, 1961 was itself a substantial departure from the "union shop" provisions of the 1960 contract, and the reason for that, Mr. Becker told the Union, was that although the International was a "good" union, "the Local Union was irresponsible" in failing to adhere in 1960 and 1961 to the strike prohibition of the 1960 contract. The Company felt, Mr. Becker stated, that the "union shop" provisions "would give too much authority" to the Local in view of "the conduct of the persons belonging" to it, and thus decided to propose the maintenance of membership clause instead. As for the Company's later shift to proposed "open shop" provisions, Mr. Becker told the Union's representatives that "after . . . the employees who worked during the (1961) strike had their clothes cut off (meaning, according to the sense of Mr. Becker's testimony, the cutting of pants "left in lockers") and acid poured in their shoes and all these things occurred in the plant, we decided we were too liberal . . . in the form of a maintenance of membership and we should reduce this authority of the Local over the employees and, as a consequence we took out the maintenance of membership clause, substituting the "open shop" provisions in the proposal of October 18, 1962."[24]

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[24] In describing the reasons given by him at the meetings for the Company's union security positions, Mr. Becker at times refers to "irresponsibility" of "the Union," but it is clear that the term "Union," as he uses it in the context and at other related places, refers to the Local, as is evident from his testimony that "I explained (in the course of the negotiations) also we felt the International Union was a good Union, but the Local Union was irresponsible and the conduct of the persons belonging to the Local Union caused us not to want to enter into a Union shop agreement with the Union." It may be noted, also, that the "union shop" provisions of the 1960 contract,

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But, according to Mr. Becker, he learned of the incidents in question in July and September of 1961; and it is a fact that he did not make the "open shop" proposal until over a year later, on October 18, 1962, although there were six negotiating meetings beginning with one on September 20, 1961 and ending with one a year later on September 19, 1962. He offers no explanation why he delayed for so long a time, and, in the absence of one, the long delay, spanning a substantial number of meetings, of itself seems odd and casts a shadow over the reasons he gives for the withdrawal of the maintenance of membership provisions and the substitution of his "open shop" proposal.

More to the point, the professed reasons are tangled in self-contradictions. Under cross-examination, explaining the shift from the "union shop" clause in the 1960 contract to the maintenance of membership provisions in the proposal of July 27, 1961 as proceeding from consideration for employees who had entered the Company's employ during the strike earlier that year and did not wish "to join the Union," he testified that "at that time we considered the background and the violence, irresponsibility, and we felt that if the employee had the ability to get out of the Union or not to join it, that this would exercise a certain influence on irresponsible conduct." One must assume that the "violence" refers to the post-strike incidents, previously described, for there is no evidence of any other "violence" prior to the Company's contract proposal of July 27, 1961, and it is evident that his claim that such incidents were a factor in the maintenance of membership proposal is much out of kilter with his testimony

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and of the Union's proposals in the negotiations, required membership in the "good" International, the employees' statutory bargaining representative, and not in the Local, whose "authority . . . over the employees" Mr. Becker claims he wished to reduce through his proposal denying the International any form of union security.

that he learned of such incidents from reports to him by the management after he made that proposal; and at odds with his claim that it was these incidents that led him to drop the maintenance of membership proposal, and to substitute for it the "open shop" provisions.

But these contradictions are not by any means all that ails the Respondent's claims regarding its bargaining stance on union security, for, after Mr. Becker's assertion, under cross-examination, that the Company had considered the "violence, irresponsibility" in making the maintenance of membership proposal, he was asked what union "irresponsibility" led him to withdraw the maintenance of membership provisions, and he replied: "The conduct in negotiations, Union committee consistently refused to get off, to negotiate a new contract as they had stated in the settlement agreement of June 13, 1961, that they would do. They refused to do it by their insisting upon reinstating the old 1960 labor agreement, by the vicious attacks on (sic) Mr. Hunter and Mr. Cody upon the Company representatives at the bargaining table and by the conduct in general."

It is unnecessary to tarry with the label of "vicious attacks," nor pause for long over the singular conception that the Union's representatives were irresponsible in their insistence upon "reinstating the old 1960 labor agreement" in the face of management proposals that would not only deprive the employees of benefits they had had under that contract (such as, for example, guarantees against various consequences of subcontracting, the requirement of a 48-hour notice of schedule changes, and shift differential payments for day shift employees for work after 4:30 p.m.), but would go far toward the devitalization of the International's capacity to protect the employees it represents, if not, for all practical purposes, destroy it. The important point is that this definition of "irresponsibility" appears for the first time after he had given evidence under direct examination picturing the Company as shifting to the

"open shop" proposal because of the post-strike incidents in 1961, and varies considerably from that testimony.

Similarly, the purported reasons for the "rule infractions," or disciplinary rules, bog down in material self-contradiction and implausibility. Mr. Becker's testimony would lead one to believe that Article XVI(B), "General Provisions," which, together with the 34 disciplinary rules incorporated in it by reference, is set forth in substantially identical terms in the Company's contract proposals of October 18, 1962 and September 2, 1964, was proposed because of "conduct that had been engaged in by the union . . . conduct we experienced after the strike (that ended June 13, 1961) by the employees after the strike having pant legs cut off and acid in boots, and valves being left on after an employee who happened to be a non-union employee left his place of assignment, and we felt it was necessary to establish rules of conduct in order to stop this type of activity." There is no identification of any person responsible for such conduct, or that "the union," whether the International or the Local, had any responsibility in the premises, or even that the "conduct" arose out of the strike. (It may be recalled in that connection, that a letter dated August 10, 1961 from the Company to the police intimates that some of the incidents, at least, were attributable to "a history of hard feelings by some of the employees towards Mr. Harold Dillard," the plant manager.) But passing these matters, it is a significant fact that the language of Article XVI(B) and its related 34 rules are incorporated in practically identical terms in Article XV, "General Provisions," of the Company's contract proposal of July 27, 1961;[25] and that Mr. Becker

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[25] The Company's contract proposals of October 18, 1962 and September 2, 1964 omit one of the 35 rules set forth in the proposal of July 27, 1961. The omitted rule would prohibit an employee from using another's identification, or to allow the use of his by another, for the purpose of entering the plant premises. The fact that the first proposal sets forth 35 "rule infractions," and that the later

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himself testified that he learned of the post-strike incidents in 1961 "soon after" the proposal of July 27, 1961, receiving reports of them, according to him, from the management in July and September of that year. This testimony is no inadvertence, for it was repeated, in substance, two or three times. The testimony and the incorporation of the 34 rules in the proposal of July 27, 1961 are plainly at odds with Mr. Becker's claim that he proposed the rules and the relevant language of the related article because of the incidents. Moreover, as Mr. Cody testified without dispute, Mr. Becker gave the explanation for the language and the rules in submitting his proposal of July 27, 1961 that MacMillan needed these provisions because they "gave the company better control of the employees;" and there is no indication that he said anything on that occasion about "conduct that had been engaged in by the union." Significantly, too, Mr. Becker's purported reasons for the disciplinary rules plainly does not jibe with testimony by Mr. Willoughby that the only proposals by the Company influenced by union "irresponsibility" were the "union shop clause" and "strike and lockout clause," the first being "the main one," according to Mr. Willoughby.

From what has been said, it is evident that the claim bottomed on the 1961 incidents of plant vandalism bear earmarks of improvisation. There is no evidence that the Company at any time prior to its proposal of October 18, 1962 attributed any responsibility for them to the Union, and taking the indicia of contrivance into account, I am impelled to conclude that the effort by the Respondent to link the incidents to the strike that had preceded them, and the attribution of fault for them to the Union, are

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[25] (Footnote continued from preceding page)

proposals omit one of them, has no material effect upon the issues. I note, too, that the two later proposals retain a requirement (Item 21 in the first proposal, and Item 20 in the subsequent ones) specifying that productivity and workmanship be "up to standard," but omit a qualification that "(t)here will be no immediate discharge" for an infraction "without prior consultation with the Union."

afterthoughts put forward in this proceeding to give an aura of reasonableness to the Company's continued insistence almost from the inception of the negotiations upon provisions that would reduce various employees' benefits, and terms that would undermine the International's capacity to represent them.

Moreover, there is a large disparity between the reasons Mr. Becker gave the Union for scaling down various benefits the employees had under the 1960 contract, and rejecting the vacation proposal made in 1961, and the motives he ascribes to the Company under cross-examination. In the course of the negotiations, and under direct examination, he gave cost factors or considerations of efficiency or operational flexibility, as the case may be, for the provisions in its contract proposal of October 18, 1962 dealing with shift differential pay, notice of schedule changes, subcontracting, leaves of absence, vacations, and premium pay for work on a day off, but, under cross-examination, he took the position that "all" of the provisions of the Company's 1962 contract proposal were "influenced by the Union's irresponsible conduct," enlarging on this claim when asked about particular provisions. The following excerpts from the record sufficiently illustrate the vein in his testimony:

Q. (By Mr. Shapiro) Directing your attention to Article V of the contract entitled "Overtime and Premium Pay," sir, in what respect did the Union's irresponsibility influence the Company's proposal concerning this article?

A. The Union's irresponsible conduct influenced it to this extent, that in considering the overtime clause, we considered the Union's conduct of the past. Its striking in violation of the contract, striking in violation of no-strike provision, the activities of the Local Union, members of the bargaining committee, the things that happened to

non-striking employees after the cessation of the strike on June 31, 1961, and all of this material plus the court decisions and the NLRB rulings and all this had an effect and was considered in our determination upon this clause (emphasis supplied).

* * *

Q. Directing your attention, Mr. Becker, to Article XVI – Article VIII entitled "Shift Differential" which is on page 7 of the agreement, with respect to this article, sir, tell us in what manner the Union's irresponsibility influenced your decision to propose this article?

A. I understand it, you asked me to what extent the Union's irresponsibility influenced us in their decision to the extent only that we considered in making our proposal.

We considered the Union's background and history and we made our proposal in light of the background and history. This is the only influence it had on us in this particular section.

* * *

Q. With respect to Article VII, (of the Company's 1962 proposal), sir . . . the article entitled "Vacations."

. . . to refresh your recollection, . . . the Union . . . had proposed . . . four weeks vacation (for employees of 20 or more years of service).

. . . to refresh your recollection, your vacation proposal is the same as in the old contract.

> Now, how, sir, did the Union's irresponsibility influence your vacation proposal . . . ?
>
> A. The Union's irresponsibility, strike history, record of violence on the picket line. These activities influenced our decision on the vacation clause to the extent we considered them and talked about them and made a determination that this type of activity would not have a great bearing on our vacation clause and in view of that, why, we made our proposal on the vacation clause (emphasis supplied).

It is not easy to understand why union "irresponsibility" should prompt the Company to scale down wage standards of its employees provided by the premium pay and shift differential provisions of the 1960 contract, or to reduce an operational benefit to them such as the 48-hour notice of schedule changes, or to reject the request for the added vacation benefit; and, indeed, the testimony of the Company's spokesman in this aspect, as in others, is attended by implausibility and inconsistency. For one thing, there is no evidence of "a record of violence on the picket line" prior to the current strike, and the claim that it was a factor in rejection of the proposed added vacation benefit for almost three years is not credible. Similarly not entitled to credence in his testimony that "the things that happened to non-striking employees" in 1961 influenced his "Overtime and Premium Pay" proposal, for the identical article appears in the Company's contract proposal of July 27, 1961, which he admittedly submitted before he learned of "the things." For another matter, as previously noted, Mr. Willoughby contradicts Mr. Becker with testimony that the only proposals of the Company influenced by union "irresponsibility" were the "union shop clause" and the "strike and lockout clause;" and what is more, at the eleventh

negotiating meeting, held on June 12, 1962, Mr. Cody asked Plant Superintendent Smock if he could function under the terms of the old agreement, and Mr. Smock, requesting and receiving Mr. Becker's consent to answer, replied, "I not only can, I have worked under the old agreement," at which point, Mr. Becker, notwithstanding his previous consent, said that he was the Company's bargaining representative, and that Mr. Smock had no right to answer the question.. That was Mr. Smock's third negotiating meeting, and his last.[26] Significantly, too, the claim of union "irresponsibility" as a factor in proposals that would scale down the economic and operational benefits in question, and in the rejection of the Union's vacation proposal for a period of several years, appears in the testimony for the first time in Mr. Becker's cross-examination and is a large departure from the reasons for such proposals he gave the Union, and puts forward in his testimony on direct examination.

Moreover, the record is barren of any plausible explanation why union "irresponsibility" as an alleged barrier to the proposed added vacation benefit did not exist when the Company, almost three years after the proposal was initially made, announced to employees in the bargaining unit, without any prior arrangement with their bargaining representative, that it was granting the benefit to "all MacMillan employees" as a matter of "policy", or, in other

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[26] The Respondent makes a point of the fact that Mr. Smock had been in the Company's employ for only about six months prior to the meeting, but the fact remains that he was the plant superintendent, and it is reasonable to believe that he would have a first-hand knowledge of operational needs and day-to-day labor-management relations within the plant, in contrast to Mr. Becker who is not a member of the Company's management. It may be pointed out, too, that Mr. Smock's statement is but one of a considerable number of factors, set forth in this decision, that I take into account in passing on the issues.

words, as previously described, used the occasion as a means of undercutting the International. In sum, the claim that union "irresponsibility" was a factor in "all" of the provisions of the Company's contract proposal of October 18, 1962 (and, by necessary inference, the same provisions embodied in its contract proposal of September 2, 1964), and the repeated assertions of the position addressed to specific terms, as described above, appear to me to be so much mechanical rote rather than candid statements of motive.

Turning to the underlying issue of the Respondent's negotiating attitudes and aims, whether or not one believes that the 15-minute work stoppage in 1960 was as dangerous, without a prior shutdown, as Mr. Mays' testimony would lead one to believe, and whether it was the Union or the Company that first breached the "status quo condition" before the walkout in March 1961, there is ample justification in the record for the Respondent's position that the Union breached the strike prohibition of the 1960 contract at least by the strike that began in April 1961, and that on the occasion of each work stoppage in 1961, the action of the participating employees in leaving their work stations, without a prior "orderly" shutdown of operations, created a hazard of fire and plant and equipment damage. It is but natural that the Company would be deeply concerned over the fact that the grievance and arbitration provisions, and the strike prohibition, of the 1960 contract did not prevent such a condition, and reasonable that it should seek added protection against its repetition.

But it is one thing to say that the Respondent had justification for such a course, and quite another to conclude that that was its aim, and the fact is that consideration of the total record reveals evidence in abundance that the Respondent's purpose in the negotiations was to prevent conclusion of "a new labor agreement" and not to achieve one.

It is a cardinal fact in this case, notwithstanding the justification for concern by the Respondent regarding strikes in violation of contract, and hazards resulting from strikes

without sufficient advance notice, that its use of the claim of union "irresponsibility" to justify its admittedly adamant insistence on large departures from the 1960 contract is caught up in a web of exaggerations, self-contradictions, afterthoughts, inconsistencies and shifting positions. The stress it now places upon union "irresponsibility" as a justification for its negotiating positions does not quite jibe with its reinstatement of Joseph Hill in the face of repeated reports of serious misconduct by him during the 1964 strike. Mr. Willoughby's testimony that only the Company's "union shop" and "strike and lockout" proposals were influenced by union "irresponsibility" of itself is sufficient warrant to discount the elaborate structure of bargaining positions the Company's spokesman in the negotiations rests on the claims of union "irresponsibility" he now puts forward, but, in addition, these contentions are so enmeshed in shifting and inconsistent positions, previously described, so beset with afterthoughts, such as the attributions to "the union" of responsibility for the 1961 acts of plant vandalism, which Mr. Becker admittedly did not know about when he made his 1961 contract proposals, and the manifestly self-contradictory claims that various provisions of that proposal, including the scaling down of employees' benefits, were influenced by such incidents, as to warrant an inference that the Respondent is using the claims of union "irresponsibility" as a facade for a negotiating aim it has chosen to conceal.

That aim, I am convinced, was to prevent the conclusion of "a new labor agreement," and the purpose appears clearly in the Company's negotiating tactics directed to matters of vital importance to the International's representative status and capacity. The basic method used was not to retain as much as possible of the 1960 contract, as Mr. Becker claims in his testimony, but to take away much, by omission or substitution, related to that capacity (not to speak of the scaling down of various employees' benefits); to inject proposals into the negotiations carrying an aura of inhibition upon the International and the employees

it represents, and then increase the climate of inhibition and of disparagement of the bargaining representative, as the meetings and the years wore on, with the injection of additional restrictive proposals that, especially in the light of prior discussions, were predictably unacceptable to the Union, and forseeably productive of deadlock. The examples of the method that follow will illustrate the point.

After more than a year of fruitless negotiations, the maintenance of membership proposal, itself a large departure from the "union shop" provisions, was discarded, and the "open shop" clause substituted, upon the purported justification of the acts of plant vandalism more than a year earlier. The right of the Company to seek *agreement* on an "open shop" is not at all in dispute, but there is also no doubt that it has no right to use the proposal for the purpose, and with the intention, of bringing about a deadlock. It is utterly unbelievable that Mr. Becker, who has had legal training and substantial experience in labor-management relations, having served for three years as regional director of the Board's Twenty-first (Los Angeles) Region, would, in the context of circumstances, ever expect the International to accept the thrust at the jugular of its representative status that the "open shop" proposal implied; and bearing in mind that the attribution to "the union" of responsibility for the acts of vandalism in 1961 is nothing but a pretext for the proposal, and that Mr. Becker uses it in his testimony at one point even as an explanation for the maintenance of membership proposal, which he made before he had any knowledge of the incidents, it is equally incredible that he had any other aim than to deadlock the negotiations by a tactic of departure, by stages, from full union security arrangements, including check-off provisions, to the modified union security reflected in the maintenance of membership provisions, and, finally, after more than a year of deadlock to the "open shop" proposal.

The proposed disciplinary rules have a surface innocence that drops away upon examination and that cannot be

restored by all the stress the Respondent puts upon union "irresponsibility" as the guide to its claimed bargaining purposes. One may reasonably believe a claim that the purpose of such rules was to give the management "better control" over the employees, as Mr. Becker told the Union in submitting the rules as part of his contract proposal of July 27, 1961, except that he goes much farther and says that the rules grew out of the acts of plant vandalism in 1961, of which he was admittedly unaware at the time of that proposal, not to speak of the fact that the claim is in conflict with Mr. Willoughby's testimony that union "irresponsibility" influenced only the Company's "union shop" and "strike and lockout" proposals.

Then why the numerous "rule infractions," some vague and general such as "Interference with plant discipline or efficiency" or "Productivity and workmanship not up to standard," some prohibiting major misconduct such as theft or dangerous activities such as the possession of weapons and explosives? There is no evidence that at the time of the initial submission of the rules Mr. Becker was aware of any conduct in the plant that would come within the reach of any but a small fraction of them. (Conceivably, the prior work stoppages would be subject to rules prohibiting employees from leaving their place of work or the plant during working hours without permission, or habitual absence, or disregard or violation of safety regulations or practices). Mr. Becker's testimony does not make us privy to the real motive for the proposal. But it is only reasonable to believe that a person with his experience in labor-management relations would know that such rules, especially when harnessed to a provision vesting the Company with discretion to expand the list, were weighted with problems for the employees' bargaining representative, and that these would grow heavier and more unacceptable to it as the Company injected positions vesting it with absolute control over the application of the rules, both those that are clear and those that are vague. That, basically, was the course the Company's spokesman took.

The application of the rules, he told the Union several months after their submission, would not be subject to arbitration, although the grievance and arbitration article of his 1961 contract proposal expressly provided that discharge or disciplinary action "shall be only for just cause." But the matter by no means rested there, for the Company's 1962 proposal not only shifted to the "open shop" provisions, but omitted the requirement of "just cause" as a condition of discharge or discipline, and injected into the negotiations, already deadlocked over a year and heavily weighted with many issues, including curtailment of various employees' benefits, a sweeping "managements rights" article (which, according to Mr. Willoughby's testimony, was not influenced by union "irresponsibility," and a singular clause that would vest *only* in the Company a right to have "the matter of arbitrability . . . first . . . decided by a court of law," provisions of obvious impact on the numerous disciplinary rules and, plainly, if accepted by the International, a virtual denial of any effective contractual means to protect the employees against unjust application of the rules short of the burdens of litigation, including possibilities of long delay leading to academic results, that the Company could at any time it chose impose upon any effort by the International to seek arbitration.

It is of no moment here whether this proposed shackle on the arbitral process is a regressive departure from modern standards of collective bargaining, nor is there any suggestion that the proposal, standing alone, in any way offends the Act; what is in point is its purpose in the negotiations. According to Mr. Becker, he told the Union that the proposal was "in keeping with the Supreme Court decisions rather than have the arbitrator make this determination of his own jurisdiction." The allusion to "Supreme Court decisions" is a reference to a group of cases, all dealing with arbitration, sometimes called the "trilogy" (as Mr. Becker refers to them), including *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, where the Court, noting (at p. 582) that "arbitration is a

matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit," held (at p. 585) that "only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail."[27]

Of course, there is not the slightest intimation by the Court that provisions such as the one in question are desirable; on the contrary, it describes at some length the beneficent role of arbitration in collective bargaining relations, expressing the view (at p. 582) that the "ablest judge cannot be expected to bring the same experience to bear upon the determination of a grievance" (as the labor arbitrator the parties choose); but passing that, it is a fact that the *Warrior* case and its two companions were decided by the Supreme Court in June 1960, more than two years prior to the relevant proposal, and if the purpose was to be "in keeping with the Supreme Court decisions," the Respondent offers no explanation why its spokesman, with his legal training and experience in the field of labor-management relations, did not include the proposal in his contract draft of July 27, 1961 but waited until the parties had been in a state of deadlock for substantially more than a year before submitting it. Significantly enough, as Mr. Cody testified without dispute, at the meeting of September 26, 1961, Mr. Becker offered "the Supreme Court rulings" (plainly, a reference to the "trilogy" cases) as the explanation for the far less restrictive "management rights" article of the Company's 1961 contract proposal, which did not have the hobble on arbitration included in its 1962 proposal. In the perspective of the whole record, there is ample warrant for an inference, and I am persuaded, that the relevant restriction on arbitrability was injected into the negotiations not because of union "irresponsibility," nor with any aim of securing agreement to the clause, but as

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[27] The two other cases in the "trilogy" are *United Steelworkers v. American Manufacturing Co.*, 363 U.S. 564, and *United Steelworkers v. Enterprise Wheel & Car Corporation*, 363 U.S. 593.

an additional obstruction to the conclusion of "a new labor agreement."

In my judgment, too, such an object was the underlying aim of the written proposal submitted by the Company at the meeting of December 4, 1964, some two months after the start of the current strike. The proposal, it will be recalled, was an addition to the article prohibiting strikes and lockouts, which appears in identical terms in all three of the Company's draft contract proposals. The addition would not only obligate the Union to pay "each striking employee" substantially the equivalent of his wages "anytime a strike, work stoppage or other concerted activity occurs by the employees covered hereunder during the term of this Agreement," but would extend the requirement for a year beyond the contract's termination, or, in other words, for a period of as much as a year even when no contract is in effect.

Mr. Becker was asked at the hearing whether he expected Mr. Cody to agree to the proposal, and he replied, "I did not know whether he would or not;" and that his purpose was "to stimulate negotiations." It was "a strategy movement on my part," Mr. Becker testified, "to endeavor to cause the union to do something . . . so that I could do something." Asked whether he withdrew the proposal in view of the evidence that it did not have the effect he claims he sought, he testified that he did so "at the bargaining table" because of the "opposition from the union," and that he "never again talked about it;" but questioned as to the manner of withdrawal, he testified: "Just a mental withdrawing of it, and in future negotiations I would offer the contract I proposed on September 2nd, 1964 with the 4½ per cent wage increase." However, following an overnight recess, he changed this testimony, stating that he had refreshed his recollection from his notes, and that he had expressly informed Mr. Cody at the meeting of January 28, 1965 that the Company had withdrawn the proposal. Mr. Cody denies being so informed, and the

Respondent itself supports the denial, adducing testimony by Mr. Willoughby that the proposal was never "referred to again by the company" after the meeting of December 4, 1964. I credit Mr. Cody.

Moreover, there is manifest implausibility in the claim that the addition to the "strike and lockout" article was proposed "in an effort to stimulate negotiations.". It must be borne in mind that by that time there had been some 24 meetings over a period of substantially more than three years without the fruit of "a new labor agreement;" that a strike had broken out, with attendant expressions of hostility and recrimination, and was in progress when the proposal was made; and, as is obvious, the strike was caused in some degree at least by the Company's adamant adherence to proposals that, if adopted, would materially weaken the International's representative status. In that setting, it imposes a large burden on one's sense of the rational to believe that Mr. Becker, with his experience, was motivated by an aim "to stimulate negotiations." The proposal to impose financial penalties upon the Union in the event of a strike during a period when it had no contract was not only predictably unacceptable but predictably inflammatory in the setting in which it was offered. Significantly, in that regard, Mr. Becker himself describes Mr. Cody as objecting "quite strenuously" to the proposal, and as saying that he had "never heard of anything like this before;" and Mr. Becker pictures himself as agreeing that "it was probably true" that no union had ever signed "anything like this." Surely, he must have known that if anything would be "stimulated," it would not be "negotiations" looking toward agreement.

Nor will be credible evidence support a conclusion that the proposal was the result of any picket line or other misconduct during the course of the strike that was then in progress, as the Respondent would lead one to believe. According to Mr. Becker, he not only frequently conferred

with Mr. Willoughby about negotiating positions, plant operations and "violence on the picket line" since the start of the present strike, but reviewed such matters with Roy Waer, a director of the Company, its vice-president in charge of Pacific Coast operations, and the source of Mr. Becker's bargaining authority, talking to Mr. Waer "practically every day" from the inception of the 1964 strike. Mr. Willoughby quotes Mr. Becker as telling him prior to the presentation of the relevant proposal to the Union that he felt it was needed "in view of the violence on the picket line and the activities that had continued." But this is manifestly at odds with testimony by Mr. Becker that he "expected by this proposal to only stimulate (Mr. Cody) and get some movement," and that it "was a strategy movement on my part to endeavor to cause the union to do something . . . so that I could do something." Moreover, Mr. Waer gave testimony to the effect that his discussions with Mr. Becker since the start of the present strike did not "involve any particular bargaining position," and "did not influence us to get rougher or harder or tough." From Mr. Waer's testimony, it would appear that his discussion of the proposal was perfunctory, for what took place, according to his account, was that Mr. Becker gave him the proposal; and that he read it, asked Mr. Becker whether he recommended it, received a reply from the latter that he thought "it is all right," and told Mr. Becker, "Well, I will go along with you."

I am convinced, in short, that the purpose of the proposal was not "to stimulate negotiations," but to obstruct them and accentuate the deadlock.

The Respondent would equate the Union's continuing insistence upon a contract in the main the same as the 1960 agreement, and its efforts, as the negotiations wore on, to secure added benefits, with the Company's insistence on its terms and its efforts to scale down or eliminate provisions of the 1960 contract, but the analogy is mechanical rather than real. There can be no doubt, as the position

implies, that rigidity of position on mandatory subjects of bargaining or the pursuit of changes in contract terms dealing with such subjects, whether upward or downward, better for oneself or worse for the other side, is not *per se* unlawful, but that conception is wholly beside the point, which is, that the Union sought "a new labor agreement" over the years, and the Company, in decisive contrast, sought to prevent one through negotiating positions and methods aimed at frustrating the bargaining process.

My assessment of the Respondent's negotiating aims does not turn upon Mr. Becker's query whether Mr. Cody had "had enough" when the latter gave the strike warning at the meeting of September 2, 1964, although in the light of the long train of fruitless discussions that had gone before, interlarded with mounting proposals to inhibit the International's capacity to protect the employees it represents, it is reasonable to read the rhetorical query as a veiled intimation that he had thus far defeated the Union's efforts to conclude "a new labor agreement," and that more of the same was in store for the Union, as, indeed, it was, as evidenced not only by the Respondent's continuing insistence upon proposals it had made for the purpose of preventing agreement, but by the injection into the negotiations of the proposal of December 4, 1964, with the aim already described.

Summarizing the matter, the Respondent's bad faith in the negotiations is abundantly established by the evidence of a purpose to prevent agreement through its progressive injection into the negotiations, as time went on, of mounting proposals for inhibition of the International's representative capability and status; the method used in 1964 to announce and put into effect the vacation benefit proposed by the Union almost three years earlier; and the Company's foot-dragging in arranging a meeting and submitting a "final proposal" following the session of December 13, 1963, as evidenced by the broken promises to arrange one made at that session, and in the Company's letter of March 30, 1964, by the fact that no meeting was held between

December 13, 1963 and May 7, 1964, and then only upon the Union's initiative, and by the Company's failure to submit a "final proposal" until September 2, 1964 (which, apart from the oral 4½% offer that followed the industry's bargaining pattern in amount, was substantially the same, for all practical purposes, as its contract proposal in 1962.)

The strike that began on September 8, 1964 was no doubt called in support of the International's contract aims, but the origin of the strike, and its prolongation, are rooted in the Respondent's conduct aimed at preventing "a new labor agreement" to replace the 1960 contract.

That conclusion is in no way affected by the testimony and hearsay reports bearing on allegations of misconduct during the strike. The fact-finder's duty to hew to the material evidence and issues is not diminished by his condemnation of misconduct, whether connected with the strike or not, and whether serious or not. There is no point in embarking on a detailed sorting out of acts of misconduct, either those alleged in the reports or the subject of testimony, with a view to determining those, such as picket line incidents, for which the Union may be held responsible; or those not proven to be attributable to the Union, or connected with the strike. It is a simple calendar fact that such incidents have no bearing on the Company's negotiating aims and attitudes prior to the strike, nor, obviously, any connection with its cause. And it is abundantly clear, and I find, that the Respondent's negotiating attitude and goals regarding "a new labor agreement" have not been materially different within the six-month period preceding the filing and service of the charge, and since then, including the period since the current strike began, from what they were prior to May 10, 1964, evidencing the same design to frustrate the bargaining process and prevent the conclusion of such an agreement, and by the same methods, exemplified by continued insistence, within the six-month period, and since, upon positions born of that design and variously embodied in the Company's contract proposals of July 27, 1961, October 18,

1962, and September 2, 1964; and by the proposal of December 4, 1964. That being the case, it is also plain that the Respondent's negotiating positions have not been shaped by any of the reports of misconduct it received during the current strike, whether or not the incidents in question are properly attributable to the Union.

Finally, I find no merit in the Respondent's claim that its bargaining duty has been suspended as a result of misconduct by "pickets and striking employees" since the strike began. Were that position accepted "it would mean that at the very point when an industrial controversy becomes most bitter and when the collective bargaining provisions of the Act should provide a peaceful means of settlement those provisions are cast aside and the employer is permitted to engage in unrestricted violation thereof" (*Reed & Prince Mfg. Co.*, 12 NLRB 971).[28]

The Respondent's bad faith in the negotiations was the basic cause of the strike, and has prolonged it; and, plainly, it would be as much as to reward the Respondent for its violation of its bargaining duty to hold that its obligation has been suspended for the reason it assigns.[29]

In sum, for the reasons stated, I find, upon the whole record, that the Company has failed and refused within six months preceding the filing and service of the charge in this proceeding, and since, to bargain in good faith with the International regarding terms and conditions of employment of the employees in the unit found appropriate above, and has thereby violated Section 8(a)(5) of the Act; that by such conduct, the Company has abridged rights guaranteed employees by Section 7 of the Act, thus violating

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[28] Enforced 205 F.2d 131 (C.A. 1); see, also, *N.L.R.B. v. Remington Rand, Inc.*, 94 F.2d 862, 872-873 (C.A. 2).

[29] *Kohler Co.*, 128 NLRB 1062, 1087-1088, cited by the Respondent, is inapposite. Among other distinguishing features, the strike there was not caused by the employer's unfair labor practices.

Section 8(a)(1) of the statute; and that by such unfair labor practices it caused, and has prolonged, the strike that began on September 8, 1964.[30]

D. The alleged violations of Section 8(a)(3)

As of December 1964, four of the striking employees[31] had neither received vacations in 1964 nor had been given vacation pay in lieu thereof. There is no dispute that they had sufficient tenure, under existing company policy, to qualify them for vacations, and that they would have received vacations but for the strike. One of the men, Stuart H. Wakefield, had been scheduled to take two weeks' vacation beginning September 10, 1964, according to a notice of vacation schedules posted by the Company the preceding April.

At the meeting of December 4, 1964, the Union inquired of the Company when employees who had "earned," but had not received, vacation pay would be paid, and Mr. Becker said that he would look into the matter.

Some four or five days later, Mr. Cody made a similar inquiry of Mr. Willoughby, either in person or by telephone

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[30] In view of the finding that the Respondent has failed and refused to bargain in good faith, I see no point in passing on allegations of the complaint that it has separately violated the Act by its proposal of December 4, 1964; and by its insistence at the meeting of November 6, 1964 upon discussing only its wage proposal, and its related rejection of the Union's proposal that other subjects be discussed as well at the meeting. To pass upon such separate allegations of statutory violations would neither add to, nor detract from, the remedy to be recommended below.

[31] Forest R. Bumgarner, Leslie E. Omo, James R. Northrop and Stuart H. Wakefield.

(the accounts vary). Mr. Willoughby assured Mr. Cody that the men would be paid what was due them.[32]

About a week later, Mr. Cody telephoned Mr. Willoughby about the matter, and the latter stated that while the Company "did not deny that they (the four men) had earned the vacation pay," the Company "had a policy of not paying personnel in lieu of vacation," believing that "vacations were taken as a rest from work," and "felt they (the four strikers) were not entitled to it unless they returned to work, or until they resigned from the company."

This statement of "policy" is not quite accurate, judging by the vacation article of the 1960 contract and the Company's subsequent proposals, for all these contain a provision that "newly hired employees shall, upon completion of their first year's service, take their pro rata vacation, or *receive their pro rata vacation pay* to January 1, so that January 1 will thereafter become their vacation anniversary" (emphasis supplied). Although the 1960 contract has long been terminated, it is evident from the incorporation of the vacation article of that agreement in the Company's 1961, 1962 and 1964 contract proposals (the last as modified by the added vacation benefit granted early in 1964), and from Mr. Willoughby's remark that the men "had earned the vacation pay," that the vacation policy set forth in the agreement and the proposals, as modified by the added vacation benefit, was in effect at least until the start of the strike.

Be that as it may, in the latter part of 1964, Mr. Wakefield filed a complaint with the California Department of Industrial Relations, seeking payment of vacation pay claimed to be due, and at a hearing before an official of that agency in February 1965, Mr. Willoughby agreed that "these vacations were due" the men in question, but that "the vacations

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[32] There are some variances between Mr. Cody's version of the conversation and that of Mr. Willoughby, but these need not be resolved. Both accounts, in substance, reflect an assurance by Mr. Willoughby that the men would be paid what was due them.

would not be paid until (sic) the duration of the strike."

Following the hearing, the Company, on or about July 15, 1965 paid each of the four men the amount each claimed to be due him as vacation pay.

The Company's conduct in refusing to make the vacation payments, when requested, and in continuing to withhold them, as described above, was unlawful. The strikers, who were "employees" within the meaning of Section 2(3) of the Act, had concededly "earned" vacations under existing Company policy, and to engraft on that policy a condition that they be denied what was due them "unless they returned to work, or until they resigned" was as much as to penalize them for striking. The proof of that is perhaps best exemplified by Mr. Wakefield's experience. He had for some months been scheduled by the Company to begin his vacation on September 10, 1964, and, in fact, went on vacation for two weeks starting on the scheduled date, although after the strike began. To refuse to pay him unless he returned to work or quit was plainly a penalty forbidden by the Act.

I find that by denying and withholding the vacation pay from the four employees, as described above, the Company discriminated against them because they engaged in a union activity, thus violating Section 8(a)(3) of the Act; and abridged Section 7 rights of employees, thereby violating Section 8(a)(1) of the Act.

The remaining allegation of discrimination centers on a claim by the General Counsel that the Company conditioned the reinstatement of two employees, Raymond Aker and Walter Warner, upon their discontinuance of membership in the Local.

In the latter part of October 1964, Mr. Aker, who had engaged in picketing over a period of some weeks during the current strike, inquired of the Signal Hill plant's office manager, Cliff Caillard, about the prospects of returning to work, stating that he would like to talk to Mr. Becker about the matter. The result was that the office manager made an

appointment with Mr. Becker for Mr. Aker, and when Mr. Warner called that day and said that he wanted to talk to someone about returning to work, Mr. Caillard suggested that he accompany Mr. Aker. The two called on Mr. Becker at the appointed time.

The record contains versions of the conversation by the three participants. During its course, according to all three, Messrs. Aker and Warner expressed concern to Mr. Becker that they would be fined by "the Union" if they went through the picket line to return to work. Mr. Aker, called by the General Counsel, testified, in substance, that he asked Mr. Becker whether he would be fined, and whether he would "have to resign" his union membership; and that Mr. Becker told him that he could not answer that, but that he (Mr. Aker) had a right to resign if he wished. Mr. Warner, also called by the General Counsel, testified much to the same effect.

According to Mr. Becker, he told the two men at the inception of his remarks that "I can't advise you . . . . I can't tell you anything. All I can do is listen to your questions." Although he describes himself as repeatedly telling them that he could not advise them as to the course to take, and did not know what course the Union would follow regarding a fine, he also testified that after repeated statements by Mr. Aker that he lacked money and needed a job, and a request for advice by both men whether they could "resign from the Union," he told them that usually "in private organizations you get out the way you get in," and that if he wished to resign from an organization, he would so inform it. According to Mr. Becker, also, asked by the two men how they should proceed, he told them, "I don't know," but that when he wishes to make a record of a communication with another party in certain situations, he does so by sending the other a telegram.

Some days later, each of the two employees sent a telegram to the Local, stating in almost identical terms that he was resigning from the Local, "effective immediately."

Several days later, on November 10, both returned to work at the Signal Hill plant.

The versions of the conversation summarized above do not reflect the reinstatement condition alleged by the General Counsel, but in the course of Mr. Aker's testimony, it developed that he had given a sworn, signed statement to a representative of the General Counsel about a month after the conversation, quoting Mr. Becker as saying, "If you want to go back to work, you will have to resign from the Union. Just send a telegram to the Union telling them you are resigning. . . . I took it that if all the men came back to work, it wouldn't be necessary to resign from the Union, but if the men remained on strike and I wanted to go back to work, I would have to resign from the Union." After reading the statement, Mr. Aker agreed that he had told the General Counsel's representative what was in the statement, and that it is "correct," but subsequently he stated that "Mr. Becker didn't tell me I had to resign," but that in response to a query as to what Mr. Becker "would do," the latter replied, I would resign and go back to work."

Although called by the General Counsel, both Mr. Aker and Mr. Warner, in demeanor and tone, evidenced reluctance to testify and some hostility toward the idea, and this, it seems to me, gives added point to Mr. Aker's affirmation that his prior sworn statement is "correct." Moreover, Mr. Becker's account reflects a repetitious, self-serving emphasis upon his reticence in giving the men any advice that is not quite in harmony with testimony he gave indicating that he did advise them, however dressed up in terms of what he would do if he were in their place.

On the other hand, it is not inherently implausible that the two employees were concerned at the prospect of a fine, and asked for, and received, advice as to the means of avoiding it, whether or not one accepts the portrayal of dissolving reticence to give advice, in the face of Mr. Aker's disclosure of his necessities, drawn in Mr. Becker's account; and Mr. Aker's affirmation that his pre-hearing statement is

"correct" is, in my judgment, too thin a platform to support the General Counsel's claim: The very statement suggests a possibility that Mr. Aker may be interpreting Mr. Becker rather than quoting him, for he says there that he "took it" that he would have to resign from the Union as a condition of reemployment only if the other employees remained on strike. In short, the General Counsel has not carried his burden of proof in the premises, and, accordingly, I shall recommend dismissal of the relevant allegation.

IV. The effect of the unfair labor practices upon commerce

The activities of the Company set forth in Section III, above, occurring in connection with its operations described in Section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several states, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The remedy

Having found that the Company has engaged in unfair labor practices violative of Sections 8(a)(5), 8(a)(3) and 8(a)(1) of the Act, I shall recommend below that it cease and desist therefrom and take certain affirmative actions designed to effectuate the policies of the Act.

Because of the nature of the unfair labor practices found above, amounting, as they do, to rejection of basic premises of the Act, and in order to make effective the interdependent guarantees of Section 7 of the Act, I shall recommend an order below which will have the effect of requiring the Company to refrain in the future from abridging any of the rights guaranteed employees by said Section 7.[33]

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[33] *N.L.R.B. v. Entwistle Manufacturing Co.*, 120 F.2d 532 (C.A. 4); *May Department Store v. N.L.R.B.*, 326 U.S. 376; *Bethlehem Steel Co. v. N.L.R.B.*, 120 F.2d (C.A. D.C.).

As it has been found that unfair labor practices by the Company caused, and have prolonged, the strike that began on September 8, 1964, I shall recommend that upon unconditional request by, or on behalf of, any employee who engaged in the strike, and has not yet been reinstated to his former, or a substantially equivalent, position, and is entitled to such reinstatement under existing law, the Company shall immediately reinstate such requesting employee to his former, or a substantially equivalent, position,[34] without prejudice to his seniority and other rights and privileges, discharging, if necessary to effect such reinstatement, any employee hired on, or since, September 8, 1964; that in the event of a failure or refusal by the Company to reinstate any such requesting employee entitled to reinstatement, as provided herein, the Company shall make such employee whole for any loss of pay he may suffer by reason of such failure or refusal, together with interest at a rate of six per cent per year; and that such loss of pay and interest be computed in accordance with the formula and method prescribed by the Board in *F. W. Woolworth Company*, 90 NLRB 289, and *Isis Plumbing and Heating Co.*, 138 NLRB No. 97, to which the parties are expressly referred.

VI. Conclusions of Law

Upon the basis of the foregoing findings of fact, and upon the entire record in this proceeding, I make the following conclusions of law:

1. MacMillan Ring-Free Oil Co., Inc., is, and has been at all material times, an employer within the meaning of Section 2(2) of the Act.

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[34] In accordance with the Board's past interpretation, the expression "former, or a substantially equivalent, position" is intended to mean "former position wherever possible, but if such position is no longer in existence, then to a substantially equivalent position." *The Chase National Bank of the City of New York*, 65 NLRB 827.

2. The International and the Local are, and have been, at all material times, labor organizations within the meaning of Section 2(5) of the Act.

3. All production and maintenance employees, including stillmen, loaders, laborers, utilitymen, and all laboratory testers and loading clerks, employed by the Company at its facility in Signal Hill, California, excluding all office clerical employees, guards, professional employees, and supervisors as defined in the Act, constitute, and have constituted at all times material to the issues, a unit appropriate for the purposes of collective bargaining, within the meaning of Section 9(b) of the Act.

4. The said International has been, at all material times to this proceeding, and is now, the exclusive representative of all the employees in the aforesaid appropriate unit for the purposes of collective bargaining, within the meaning of Section 9(a) of the Act.

5. By failing and refusing to bargain collectively with the International, as the exclusive representative of the employees in the aforesaid appropriate unit, as found above, the Company has engaged, and is engaging, in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By denying and withholding vacation pay from employees, as found above, the Company has engaged in unfair labor practices within the meaning of Section 8(a)(3) of the Act.

7. By abridging the exercise of rights guaranteed employees by Section 7 of the Act, as found above, the Company has engaged, and is engaging, in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

8. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Sections 2(6) and 2(7) of the Act.

9. The strike that began on September 8, 1964 was caused, and has been prolonged, by the Company's unfair labor practices, as found above.

10. The record does not establish that the Company has conditioned the employment of employment of employees upon their withdrawal from any labor organization.

VII. RECOMMENDED ORDER

Upon the basis of the foregoing findings of fact and conclusions of law, and upon the entire record in this proceeding, I recommend that MacMillan Ring-Free Oil Co., Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with Oil, Chemical and Atomic Workers International Union, AFL-CIO, as the exclusive bargaining representative of its employees in a bargaining unit consisting of all production and maintenance employees, including stillmen, loaders, laborers, utilitymen, and all laboratory testers and loading clerks, employed by the Company at its facility in Signal Hill, California, excluding all office clerical employees, guards, professional employees, and supervisors as defined in the Act.

(b) Discouraging membership of any of its employees in Oil, Chemical and Atomic Workers International Union, AFL-CIO, or in any other labor organization, by denying or withholding from any employee any privilege, benefit, money or other thing of value due him, because of his membership in, or activities with, or on behalf of any labor organization.

(c) In any other manner interfering with, restraining or coercing employees in the exercise of any rights guaranteed them by Section 7 of the National Labor Relations Act, as amended.

2. Take the following affirmative action which, I find, will effectuate the policies of the Act:

(a) Upon request, bargain collectively with Oil, Chemical and Atomic Workers International Union, AFL-CIO, as the exclusive representative of the employees in the bargaining unit found appropriate above, with respect to their rates of pay, wages, hours of employment, and any other terms and conditions of employment; and if an agreement is reached, embody it in a signed contract.

(b) Upon unconditional request by, or on behalf of, any employee who engaged in the strike that began on September 8, 1964, and has not yet been reinstated to his former, or a substantially equivalent, position, and is entitled to such reinstatement under existing law, immediately reinstate such employee to his former, or a substantially equivalent, position, without prejudice to his seniority and other rights and privileges, discharging, if necessary to effect such reinstatement, any employee hired since the inception of, or during, the said strike; and in the event of failure or refusal by the Company to reinstate any such requesting employee entitled to reinstatement, as provided herein, make such employee whole, together with interest, to the extent of, and in accordance with, the manner and method prescribed for such employee in Section V, above, entitled "The remedy."[35]

(c) Post in conspicuous places at its place of business in Signal Hill, California, including all places there where notices to employees are customarily posted, copies of the said notice attached hereto and marked "Appendix A." Copies of said notice, to be furnished by the Regional Director of the Twenty-first Region of the National Labor Relations Board, shall, after being signed by a duly authorized representative of the Company, be posted by it immediately upon receipt thereof; and maintained by it for 60 consecutive days thereafter in such conspicuous places.

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[35] The purpose of expressly limiting the reinstatement right to those "entitled" thereto is to reserve to the Respondent any right it has, under existing law, to deny reinstatement to an employee because of misconduct by him arising out of, and in connection with, the strike. Should the Respondent deny reinstatement to any employee on that ground, the propriety of its action, and the back pay due if there is insufficient ground for its action under existing law, are reserved for determination in the compliance stage of this proceeding.

Reasonable steps shall be taken by the said Company to insure that said notices are not altered, defaced or covered by any other material.[36]

(d) Notify the said Regional Director, in writing, within 20 days from the receipt of a copy of this decision what steps the Respondent has taken to comply therewith.[37]

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It is further recommended that so much of the complaint be dismissed as alleges that the Respondent conditioned employment of employees upon their withdrawal from the Local, and thereby violated the Act.

Dated:

/s/ HERMAN MARX
Trial Examiner

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[36] In the event that these recommendations are adopted by the Board, the words "A DECISION AND ORDER" shall be substituted for the words "THE RECOMMENDATIONS OF A TRIAL EXAMINER" in the notice. In the additional event that the Board's order is enforced by a decree of the United States Court of Appeals, the words "A DECREE OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER" shall be substituted for the words "A DECISION AND ORDER."

[37] In the event that these Recommendations are adopted by the Board, Paragraph 2(d) thereof, shall be modified to read: "Notify the said Regional Director, in writing, within 10 days from the date of this order what steps the Respondent has taken to comply therewith."

APPENDIX A

NOTICE TO ALL EMPLOYEES PURSUANT TO THE RECOMMENDATIONS OF A TRIAL EXAMINER

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

WE WILL NOT refuse to bargain collectively with OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION, AFL-CIO, as the exclusive bargaining representative of our employees in a bargaining unit consisting of all production and maintenance employees, including stillmen, loaders, laborers, utilitymen, and all laboratory testers and loading clerks, employed by us at our facility in Signal Hill, California, excluding all office clerical employees, guards, professional employees, and supervisors as defined in the said Act.

WE WILL NOT discourage membership of any of our employees in OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION, AFL-CIO, or in any other labor organization, by denying or withholding from any employee any privilege, benefit, money or other thing of value due him, because of his membership in, or activities with, or on behalf of, any labor organization.

WE WILL NOT in any other manner interfere with, restrain or coerce any of our employees in the exercise of any rights guaranteed them by Section 7 of the said Act.

WE WILL, upon request, bargain collectively with OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION, AFL-CIO, as the exclusive representative of the employees in the unit described

above, with respect to their rates of pay, wages, hours of employment, and any other terms and conditions of employment, and any other terms and conditions of employment; and if an agreement is reached embody it in a signed contract.

WE WILL, upon request by, or on behalf of, any employee who engaged in the strike, and has not yet been reinstated to his former, or a substantially equivalent, position, and is entitled to such reinstatement, immediately reinstate such employee to his former, or a substantially equivalent, position, without prejudice to his seniority and other rights and privileges, discharging, if necessary to effect such reinstatement, any employee hired since the inception of, or during, the strike; and in the event we fail or refuse to reinstate any such requesting employee entitled to reinstatement, as provided herein, we will reimburse such employee for any loss of pay he may suffer by reason of such failure or refusal.

MACMILLAN RING-FREE
OIL CO., INC.

Dated _____ By _____
(Representative) (Title)

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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 356

OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION, LONG BEACH LOCAL NO. 1-128, PETITIONER

v.

NATIONAL LABOR RELATION BOARD, AND MACMILLAN RING-FREE OIL COMPANY, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

Upon a charge filed by petitioner Union,[1] the Board found, after an administrative hearing, that the Company had violated Section 8(a)(5) and (1) of the National Labor Relations Act, by refusing to bargain in good faith with the Union, and entered an appropriate remedial order. Pet. App. 18-104. The bar-

[1] The Union intervened in the court below.

gaining negotiations spanned a four-year period, between June 1961 and April 1965. But since the unfair labor practice charge was not filed until November 10, 1964, and since Section 10(b) of the Act sets a six-month period of limitations,[2] the Board based its unfair labor practice finding on the events which occurred on and after May 10, 1964, and utilized the prior events merely to "shed light on the true character of matters occurring within the limitations period." Pet. App. 30, quoting from *Local 1424, Int'l Assoc. of Machinists* v. *National Labor Relations Board*, 362 U.S. 411, 416.

The court of appeals denied enforcement of the pertinent part of the Board's order. Although recognizing that "evidence of events occurring more than six months before the filing of a charge may be used to 'shed light' upon events taking place within the six-month period," the court concluded that the policy underlying Section 10(b) would be unduly impaired unless "the evidence of a violation drawn from within that period [is] reasonably substantial in its own right." Pet. App. 13-14.[3] Concluding that the events

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[2] Section 10(b), in relevant part, reads:

> *Provided*, that no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made * * *.

[3] The Court added (Pet. App. 14, n. 6):

> We use the term "substantial" merely in the sense of "significant" or "not inconsiderable," and do not of course intend to indicate that the evidence drawn from within

which occurred within the limitations period were not "substantial" (Pet. App. 3-7), the court held that the Board's finding of a refusal to bargain in good faith was barred by Section 10(b) of the Act.

While the Board agrees with petitioner that the court of appeals erred in holding Section 10(b) a bar to the finding of an unfair labor practice, the Board has not undertaken to seek certiorari. As this Court's opinion in *Local 1424, supra*, shows (see 362 U.S. at 416-422), there is often a delicate line, which necessarily turns on the facts of the particular case, between the use of events prior to the 10(b) period merely to shed light on subsequent events which may in themselves constitute unfair labor practices, and the use of time-barred events "to cloak with illegality that which was otherwise lawful" (*id.*, at 417). Moreover, the Board's decision in this case does not fully explicate the basis for its conclusion that 10(b) was not a bar, since the Board adopted the trial examiner's decision which simply stated that events prior to the limitations period were being "utilized to shed light on the true character of matters occurring within the limitation period" (Pet. App. 30). For these reasons, the Board does not believe that the instant case is an appropriate one for review by this Court.

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the limitations period must of itself be sufficient to sustain an unfair labor practice finding in enforcement proceedings.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1968.

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IN THE

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October Term, 1968
No. 356

OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION, LONG BEACH LOCAL No. 1-128,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD and MacMILLAN RING-FREE OIL COMPANY, INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF IN OPPOSITION.

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NATIONAL LABOR RELATIONS BOARD and MACMILLAN RING-FREE OIL COMPANY, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF IN OPPOSITION.

Respondent MacMillan Ring-Free Oil Co., Inc. accepts Petitioner's reference to the reports of the case below, the jurisdictional statement, and citation of statutes involved.

Question Presented.

Whether the Court of Appeals correctly set aside the Board's finding that the Respondent failed to bargain in good faith where there was no reasonably substantial or significant evidence occurring within the six month period preceding the filing of the charge upon which to support such a finding and where the only substantial evidence to support the finding was drawn from events, occurring as much as three years prior to the filing of the charge.

Statement of the Case.

The following is a limited statement of facts. Because of the restrictive nature of the question presented to this Court, it is not necessary to belabor the facts in the voluminous record or to set forth the other defenses unrelated to Section 10(b) of the Act asserted by the Respondent before the Court of Appeals and which that Court found unnecessary to pass upon in making its decision.[1]

Without explanation or amplification the Board adopted the discursive decision of the Trial Examiner. It is apparent from the Trial Examiner's decision, although he gave lip service to the express requirements of Section 10(b) of the National Labor Relations Act, 29 U.S.C. §160(b) that the finding that the Company failed to bargain in good faith was based entirely upon events and negotiations occurring more than six months before the filing of the charge. Many of the acts relied upon by the Trial Examiner occurred as much as three years prior to the filing of the charge.

The charge was filed on November 10, 1964, and therefore Section 10(b) prohibits the finding of any unfair labor practice based upon events which occurred prior to May 10, 1964.

An examination of the few events, proposals and conversations which were considered by the Trial Examiner and which occurred during this six month period were totally insufficient to sustain a finding that the Company violated its bargaining duty.

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[1]Respondent does not, however, concur in the argumentative Statement of the Case set forth in the Petition.

First, the Trial Examiner found that the parties had agreed at the meeting of May 7, 1964 to postpone negotiations during the pendency of industry-wide negotiations in order to allow the industry to reach a settlement that could be used by the parties to measure their bargaining proposals with regard to the economic provisions of any new collective agreement [App. 42].[2] Since this agreement occurred before the six month limitation period, then admittedly as of May 10, 1964, the parties having agreed not to negotiate, the Company could not have been in violation of its bargaining duty.

The first event occurring during the six month limitation period was a telephone conversation between the parties' negotiators during the first part of August, 1964 [App. 43]. There is absolutely no evidence of any act, proposal, negotiation, conversation, discussion, refusal to meet, or other evidence during the six month limitation period prior to this telephone conversation.

The Trial Examiner states that "the only matter of any substance in issue [referring to the details of the first August telephone conversation] is whether Mr. Cody or Mr. Becker initiated the first call in August . . ." [App. 44]. Both Mr. Cody, the Union's negotiator, and Mr. Becker, the Company's negotiator, claimed to have initiated the first telephone conversation which occurred in the first part of August [App. 43]. However, despite the fact that the Trial Examiner found

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[2]"Tr." refers to the reproduced portions of stenographic transcript of the unfair labor practice hearing which together with "Volume 1, Pleadings" comprised the record in the Court of Appeals and certified copies thereof have been filed with the Petition. "App." refers to the appendix to the Petition for Certiorari.

that Mr. Cody initiated the first telephone conversation [App. 43], there is certainly no substance in such a finding upon which to base a determination that the Respondent refused to bargain [App. 43]. According to their prior agreement, there was no immediate compulsion upon either party to begin bargaining, and a determination whether or not Mr. Cody did in fact initiate the first telephone conversation in August constitutes not a scintilla of evidence to support a determination that Company had violated its bargaining duty.

Thereafter, Mr. Becker, according to Mr. Cody's own testimony, did call Mr. Cody to arrange the negotiating session of September 2, 1964 [App. 43]. Certainly the Trial Examiner did not base his finding that the Company had violated the Act upon Mr. Becker's initiation of a bargaining session by his telephoning Mr. Cody sometime around the middle of August.

Thus, from May 10 until the first part of September, 1964, there was no action taken by either of the parties upon which the Trial Examiner would be correct in attempting to utilize evidence of acts occurring prior to May 10, 1964, to shed light upon that action's true character.

The parties met on September 2, 1964, and the Trial Examiner did find that on that date Mr. Becker made an offer to the Union of either a pension plan or a 4½% wage increase and did present to the Union a written contract proposal [App. 46]. It is true, as noted by the Trial Examiner, that the Union rejected the Company's offer of September 2, 1964 [App. 47]. However, there is not a scintilla of evidence in the record concerning the meeting of September 2, 1964

which establishes that the Company was either attempting to undercut the Union or was bargaining in bad faith.

The parties met again on September 4, 1964 under the auspices of the Federal Mediation and Conciliation Service. Inasmuch as the Trial Examiner found that the parties were principally concerned at that meeting with a determination of whether or not the Company had in fact made a wage offer of 4½% on September 2, 1964 and because the Trial Examiner found that the Company had made such a wage offer [App. 50], nothing that occurred at that meeting demonstrates that the Company was refusing to bargain.[3]

The Trial Examiner summarized the positions of the parties as of September 4, 1964:

> "As of that point, the divisions between the parties consisted, basically, of the differences between the types of pension plans they had respectively proposed, and between the Union's contract proposal of September 19, 1962, the terms of which, putting aside its wage schedule and a relatively few minor changes, were virtually identical with those of the 1960 contract, and the Company's contract proposal of September 2, 1964, which, as previously indicated, was little different from the Company's proposal of October 8, 1962." [App. 51-52; R. 36, lines 39-46].

The negotiating session of September 4, 1964, was the last meeting held by the parties prior to the strike.

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[3]The Union denied the wage increase offer had been made on September 2, 1964. But as found by the Trial Examiner, the substantial wage offer had been made by the Company prior to the strike [App. 50-51].

The only other event occurring within the limitation period considered by the Trial Examiner was the letter of September 3, 1964 mailed by the Company to its employees. The Trial Examiner expressly held that the record would not sustain a conclusion that the relevant statements in the Company's letter of September 3, 1964, "amount either to manifestations of bad faith in bargaining or any abridgement of the rights guaranteed employees by Section 7 of the Act." [App. 51]. Therefore, the letter of September 3, 1964 was not a basis for a determination that the Company had refused to bargain prior to September 8, 1964.

In order to realize the exceptional facts of the instant case and the clearly erroneous determination of the Trial Examiner and the Board, all of the events occurring during the six-month limitation period prior to the strike of September 8, 1964, as of which time the Trial Examiner concluded the Company was derelict in its bargaining duty, are set forth below in schedule form.

May 7, 1964 Agreement of parties not to meet until Industry Settlement final.

May 10, 1964 (*Inception of six-month limitation period*)

August (?) 1964 Becker-Cody telephone conversation *re* industry settlement.

August (?) 1964 Becker calls Cody to arrange meeting of September 2, 1964.

Sept. 2, 1964 Parties meet, Company offers 4½% wage increase or pension plan and submits written proposal.

Sept. 3, 1964 Company mails letter to employees (*expressly found to be no evidence of bad faith*).

Sept. 4, 1964 Negotiating session mainly to determine whether Company made wage offer of 4-½%.

Sept. 8, 1964 Strike (*Date as of which Trial Examiner found company had refused to bargain*).

Section 10(b) has been held by this Court to be a statute of limitation and not an evidentiary rule. As such, it was not waived by the Company which continually raised the objection that its rights under Section 10(b) were being violated by the Trial Examiner's allowing the wholesale introduction of evidence antedating the six-month limitation period. The Trial Examiner attempted to sustain his determination that the Company had violated its bargaining duty prior to September 8, 1964 by the bald assertion that the role of events antedating the limitation period was merely to shed light on events occurring within the period. However, as the above discussion reveals, *there was absolutely no evidence of any happenings during the limitation period of such a character that the evidence of events prior to May 10, 1964, could legitimately be utilized by the Trial Examiner.*

Was the Trial Examiner's determination based upon a finding that the Company did not demonstrate due diligence in attending negotiating sessions? In his opinion he refers to evidence antedating the six-month limitation period as demonstrating the "foot dragging" tendencies of Company. However, as the parties had agreed on May 7, 1964 not to meet until a certain time, and when that time was reached the parties did in fact meet, there is not a scintilla of evidence within the relevant period upon which to conclude that

Company was engaging in "foot dragging" or dilatory maneuvers. Similarly, inasmuch as the Company did in fact meet, did present a proposal with substantial increased economic benefits, and demonstrated a desire to reach an agreement, there is no evidence within that period that it refused to bargain in good faith. The only conclusion which may be reached from the events occurring during the limitation period is that *neither* party had retreated from its position taken three years prior on the non-economic items.[4]

The Court of Appeals, in its decision denying enforcement of the pertinent part of the Board's order, recognized that it was uncontradicted that the Company did very little between May 10 and September 8, 1964 which could conceivably constitute a refusal to bargain [App. 4].[5] The Court also noted that throughout the entire course of the negotiations the "union likewise remained adamant, refusing to retreat to any substantial extent from its original proposals on most issues [App. 5; fn. 4]. The Court of Appeals then held:

> "[W]e think that to allow the Board to find a violation where the only substantial evidence supporting that finding is drawn from events occurring prior to the allowable six-month period would violate the section's clear purpose

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[4]The Company had agreed with the Union and put into effect a 5% wage increase in January, 1963, and as of September 2, 1964, was proposing a 4½% increase. [App. 38-39, 45-46].

[5]Although the Board expressly found that the Company's actions subsequent to September 8, 1964 were proper and did not constitute support for a finding of a violation of the Act, the Court of Appeals correctly noted that because the strike commencing on September 8, 1964 was found to be the result of a refusal to bargain, the Board's opinion on that question must be sustained by substantial evidence prior to that date. [App. 3-4].

> ' "to bar litigation over past events after records have been destroyed, witnesses have gone elsewhere, and recollections of the events in question have become dim and confused," . . .'
>
> * * * *
>
> "To recapitulate, then, we hold that while evidence of events occurring more than six months before the filing of a charge may be used to 'shed light' upon events taking place within the six-month period, the evidence of a violation drawn from within that period must be reasonably substantial in its own right. * * * Thus the Board's conclusion that MacMillan improperly refused to bargain with the union during the applicable limitations period cannot be upheld." [App. 13-14].

The Court of Appeals held that the events occurring during the 10(b) period were plainly insufficient to support the Board's finding of a refusal to bargain [App. 4].[6]

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[6]The assertions in the Petition that the Court below found that the unfair labor practice admittedly occurred within the six-month period (Pet. 22) and that the Court below acknowledged that the violation "occurred" during the six month period (Pet. 16) are misleading and without basis in the Court's decision. To the contrary, the Court specifically held that no such violation occurred during the 10(b) period. Petitioner is obviously relying upon phrases taken out of context from the Court's statement that:

> "Section 10(b) has been characterized as 'a statute of limitations, and not a rule of evidence.' *Local 1421, IAM v. NLRB*, 362 U.S. 411, 415 (1960). And *literally*, of course, the violation found by the Board 'occurred' within the specific six-month period before the filing of the charge." [Emphasis added].

Reasons Why Writ Should Not Be Granted.

1. Certiorari should not be granted because this case involves only a determination of fact decided under the rule established in *Local 1424, International Association of Machinists v. N.L.R.B.*, 362 U.S. 411 (1960). Although Petitioner contends that the Court of Appeals relied upon an incorrect principle of law, as noted in the Memorandum for The National Labor Relations Board in Opposition, the Court of Appeals merely had to determine that "delicate line, which necessarily turns on the facts of the particular case." (p. 3).

2. Although the Court of Appeals did characterize its decision as determining a question not before this Court in *Local 1424, Int'l Ass'n of Machinists v. N.L.R.B.*, 362 U.S. 411 (1960), Respondent submits the Court's decision is directly in accord with the case. As in the *Machinists* case the Court of Appeals held that evidence antedating the limitations period could be utilized to shed light on more recent events. By holding that evidence of a violation drawn from within the period must be reasonably substantial or significant, the decision is in full accord with the principle noted with approval by this Court in the *Machinists* case that "acts within the limitations period must under Board doctrine yield some substantial evidence of unlawful conduct." 362 U.S. 411, 422 fn. 13.

The decision of the Court of Appeals is also in accord with the Congressional intent underlying Section

10(b), approved and enforced by this Court in the *Machinists* case that Section 10(b) constitutes a bar to litigation over past events "after records have been destroyed, witnesses have gone elsewhere, and recollection of events in question have become dim and confused, H.R. Rep. No. 245, 80th Cong., 1st Sess. p. 40 and of course to stabilize existing bargaining relationships." 362 U.S. 411, 419.[7]

3. The decision of the Court below is not in conflict directly or even indirectly, with the decisions of other courts of appeals. The decisions in *Sheet Metal*

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[7] In *Machinists* this Court stated:

> "The Examiner's Report shows the pertinency of this statutory purpose in the present case. In his analysis of the evidence, he observed:
> "'It is evident that with many witnesses testifying as to numerous different matters, it would protract this report greatly to summarize all of the testimony, or to spell out fully the confusion and inconsistencies therein, much of which is not too surprising, in view of the fact that, with respect to the events of August 1954 [the events "at the core" of the allegations of illegality], there had been a lapse of almost 15 months before testimony was given in November 1955.' 119 N.L.R.B., at 529."

The Trial Examiner in the instant case similarly observed:

> "As may be expected with so many meetings over so long a period, the record of the negotiations is voluminous, each side giving its version of many matters, with attendant differences in emphasis and detail. Understandably, I omit various details that, in my view, cannot possibly affect the results and would, by review here, only add encumbrance to an already heavily burdened record, although I include other details of no particular significance to facilitate conversion of a complex, and at times confusing, record into a narrative account connecting and setting forth the findings and conclusions on the material issues."

In *Machinists* there was a lapse of only 15 months before the testimony was given. In this case, there was a lapse of as much as three and four years before testimony was given concerning facts the Trial Examiner found significant.

Workers' Int'l Ass'n v. N.L.R.B., 293 F. 2d 141 (D.C. Cir. 1961), cert: denied, 368 U.S. 896 (1961), *International Union, United Automobile Workers v. N.L.R.B.*, 363 F. 2d 702 (D.C. Cir. 1966), cert. denied, 385 U.S. 973 (1966) involved and in effect held that where there has been significant active conduct during the limitations period, events prior to the six-month period may be utilized to shed light on that conduct. The implied holding in both the *Sheet Metal Workers* case and the *Automobile Workers* case, and the express holding in the instant case was that if no significant or substantial acts occurred during the limitations period, any finding of a violation by the Board must of necessity be based solely upon events preceding the limitations period. In both the *Sheet Metal Workers* case and the *Automobile Workers* case, substantial and significant events or acts did occur during the limitations period.

4. As noted by the Memorandum of the National Labor Relations Board in Opposition, the Board in this case did not articulate any theory concerning the application of Section 10(b) to the facts of the case.

The other decisions cited by the Petition dealing with the specific and unique question of determining when a charge is timely which alleges an unlawful refusal to reinstate unfair labor practice strikers are completely irrelevant to the decision of the Court below. The question of a timely 8(a)(3) charge was not put in issue by the charge in the instant case nor presented to the Trial Examiner, the Board or the Court of Appeals.

Conclusion.

Wherefore, Respondent respectfully submits that this Court should deny the Petition for Certiorari.

Respectfully submitted,

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and
MACMILLAN RING-FREE OIL COMPANY, INC.,

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

I

THE COMPANY'S PRINCIPAL ARGUMENT SIMPLY BEGS THE QUESTION IN THIS CASE

Most of the Company's Brief is devoted to a recitation of the events which occurred in the six-month period immediately preceding the filing of the unfair labor practice charge. The company then argues that these events, when viewed in isolation, do not provide an adequate basis for the finding that the Company failed to bargain with the Union in good faith.

This argument begs the very question which this case presents. We do not challenge, in this Court, the conclusion of the court below that the evidence which

was drawn from the six-month limitations period, if examined in a vacuum, is insufficient to support the Board's unfair labor practice finding. But there was an abundance of other evidence in the record – evidence of events, statements, and actions which had occurred in the course of the nearly three years of negotiations which preceded the six-month period covered by the charge. The Board found that the true nature and purpose of the Company's actions within the limitations period became clear when those actions were viewed in the light and context of the Company's earlier behavior. It was on this basis that the Board found that the Company had failed to bargain in good faith within the six-month period preceding the filing of the charge.

The question which this case thus presents is whether Section 10(b) of the Act permits the Board to rely primarily on events which occurred outside the limitations period in order to determine the true nature and purpose of actions which occurred within that period, and which are alleged to violate the Act. The Court below answered this question in the negative. Other courts of appeals have answered it in the affirmative. (See cases cited at pp. 17-22 of the Petition.) This Court has previously refrained from deciding the question on the ground that it was not squarely presented. *Local 1424, Int'l Ass'n of Machinists v. NLRB*, 362 U.S. 411, 421-422 (1960). This case now does squarely present the issue, and we believe it should finally be decided.

II

THE COMPANY'S OTHER ARGUMENTS ARE BASED ON A FUNDAMENTAL MISCONCEPTION OF THE NATURE OF THE DUTY TO BARGAIN IN GOOD FAITH

The Company also seems to take the position that none of its actions within the six-month limitations period could possibly constitute an unfair labor practice,

even when viewed against the background of its earlier behavior. After all, the Company contends, it did not refuse to meet with the Union or engage in any delaying tactics or other manifestly improper actions within the limitations period. For a time the negotiations were suspended by mutual agreement of the parties; thereafter the parties did meet, and the Company made a proposal which the Union rejected. How, asks the Company, can its prior misconduct transform these later actions into a refusal to bargain?

This argument, of course, misconceives the nature of the statutory duty to bargain in good faith. As this Court itself has observed, "Collective bargaining . . . is not simply an occasion for purely formal meetings between management and labor, while each maintains an attitude of 'take it or leave it'; it presupposes a desire to reach ultimate agreement, to enter into a collective bargaining contract." *NLRB v. Insurance Agents*, 361 U.S. 477, 485 (1960). The "performance of the duty to bargain requires more than a willingness to enter upon a sterile discussion of union-management differences." *NLRB v. American National Insurance Co.*, 343 U.S. 395, 402 (1952). "'Good faith bargaining must be evinced by more than superficial efforts to negotiate a wage agreement. Good faith means sincerity, candor, and a willingness to negotiate toward the possibility of effecting compromises.'" *NLRB v. Generac Corp.*, 354 F. 2d 625, 628 (7th Cir. 1965).

The Board therefore had to determine whether the Company had, within the six-month period of limitations, bargained in good faith with a sincere desire to reach agreement, or whether it had simply engaged in a "sterile discussion," with the object and purpose of avoiding agreement. Perhaps it would not have been possible to answer this question solely on the basis of the evidence drawn from within the limitations period.

But when the Board compared the so-called "final offer" which the Company tendered to the Union within the limitations period with the Company's earlier proposals[1] and with the parties' prior contact, and when the Company's prior dilatory conduct and contemptuous attitude toward both the Union and the collective bargaining process were added to the picture, the Board had no difficulty finding that the Company's bargaining activities within the limitations period were a mere sham, and that it had made no sincere effort to reach an agreement.

It should be emphasized that the court below did not hold that the inferences and findings which the Board drew from the entire record were illogical or unwarranted by the evidence. It merely held, as a matter of law, that Section 10(b) precluded the Board from relying to the extent that it did on evidence which antedated the limitations period in order to ascertain the true purpose and nature of the Company's behavior within that period. This was the sole basis for the court's reversal of the Board's refusal-to-bargain finding. It is this holding which we believe should be reviewed by this Court.

---

[1] The Company contends that "the only conclusion which may be reached from the events occurring during the limitation period is that *neither* party had retreated from its position taken three years prior on the non-economic items." (Co. Br. p. 8, emphasis in original). The basic point, however, is that the Board found that the position taken by the Company "three years prior" was not taken in good faith, but was deliberately designed to prevent the consummation of an agreement. Thus, the Company's failure to retreat from its earlier position, and its re-submission of the same contract proposals within the limitations period, is precisely what the Board found to constitute a failure to bargain in good faith.

III

THE BOARD'S BRIEF REFLECTS ITS OWN INABILITY TO SETTLE THE ISSUE PRESENTED IN THIS CASE

The Brief filed by the National Labor Relations Board requires little comment. While acknowledging, as it must, that the decision below was erroneous, the Board urges this Court to deny review because "the Board's decision in this case does not fully explicate the basis for its conclusion that 10(b) was not a bar . . ."

The position which the Board has taken here is merely a reflection of the confusion and inconsistency that has characterized the Board's attempts to interpret and apply Section 10(b). It appears that the Board is reluctant to urge that certiorari be granted because it would then be faced with the embarrassing task of reconciling its decision in the present case with some of its other decisions which appear to go in the opposite direction. The Board was confronted with a similar difficulty when it attempted before this Court to defend its decision in the *Machinists* case, *supra.*

Although we can sympathize with this problem, we submit that the Board's embarrassment – or even its failure to "fully explicate the basis for its conclusion" – is not a ground for denying the writ of certiorari. See, *e.g., NLRB v. Metropolitan Life Ins. Co.*, 380 U.S. 438 (1965), where the Court granted certiorari and then, after argument on the merits, remanded the case to the Board in order to give it an opportunity to more fully explain its decision.

That case involved a Board determination as to the scope of an appropriate bargaining unit, a matter which the statute commits almost entirely to the Board's discretion. The present case, on the other hand, involves a

pure question of statutory construction. For this reason, we believe that this Court can resolve the issue in this case without the necessity of a remand. But even if the Court should feel otherwise, the appropriate disposition would be a reversal and remand, as in the *Metropolitan* case, not a denial of certiorari.

Respectfully submitted,

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